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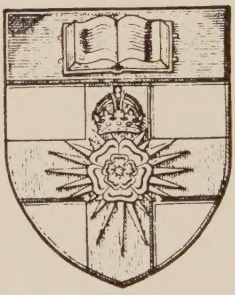

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Edward C. Dunn
Lincoln
1867

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THE

LAW REPORTS.

Equity Cases

BEFORE

THE MASTER OF THE ROLLS

AND THE

VICE-CHANCELLORS.

EDITED BY G. W. HEMMING, BARRISTER-AT-LAW.

VOL. I.

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ERRATA & ADDENDA.

[The sign — prefixed to the number indicating the line, signifies that it is reckoned from the bottom of the page.]

Page.	*Line.*	*For*	*Read*
46	— 14	Plaintiffs	Defendants.
52 53 54	head-note — 10 16	20 & 21	21 & 22.
54	foot-note	1 H & M.	2 H. & M.
97	foot-note (5)	3 T. R.	2 T. R.
286	head-note	19 & 20 Vict. c. 20	19 & 20 Vict. c. 120.
322	— 3	*After the word* "lease" *insert* "which was sanctioned by a General Meeting on the 17th Dec. 1862."	
387	17	to	not
390	— 1	After *Bridson* v. *Benecke*	insert reference 12 Beav. 1.
434	foot-note (5)	1 Y & C. Ch. 58	8 D. M. & G. 760.
439	foot-note (2)	T. R.	T. & R.
573	1	Feb. 29	Feb. 9.
586	foot-note (3)	2 Sim. 253	2 Sim. (N. S.) 255.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

In re LEEDS BANKING COMPANY. *Ex parte* PRANGE.

V.-C. K.
1865
Nov. 4, 14.

Bill of Exchange—Indorsement "in need"—Notice of Dishonour.

A Bill of Exchange, the drawer and acceptor of which became bankrupt before it fell due, was indorsed by the *Leeds Banking Company* to Messrs. *P.*, of *Liverpool*, payable "in need" at a bank in *London*. When it fell due, it was presented by Messrs. *P.'s* agent in *London* at the banks notified for payment by the acceptor and indorser, and dishonoured at both banks. Messrs. *P.'s* agent then sent notice of the dishonour, by post, to Messrs *P.*, at *Liverpool*; and they, by post, sent notice to the liquidator of the *Leeds Banking Company*, which was being wound up. Upon claim against the *Leeds Banking Company*, under the winding-up, in respect of the bill:—

Held, that the indorsement "in need" constituted the bank notified "in need" agents of the indorsers for payment only, and not agents for notice of dishonour generally; and therefore that notice to them of dishonour by the acceptor was not notice to the indorsers.

That presentation for payment to an indorser is not *per se* notice of dishonour by the acceptor; and,

That the rule allowing a day for each step in presentation and notice applies only as between the parties to a bill, and does not give a day for communication between the agent of the holder of a bill and such holder who resides at a distance; and, therefore,

The court disallowed the claim.

THIS was an adjourned summons arising out of a claim made by Messrs. *Prange* under the winding-up of the *Leeds Banking Company* in respect of two bills of exchange indorsed by the

V.-C. K. 1865 ~~ LEEDS BANKING CO.

Leeds Banking Company to them, of which bills they were holders.

The first bill was a three months' bill for £564, dated the 4th of August, 1864, drawn by Messrs. *Watts & Co.*, and accepted by Messrs. *Early, Smith, & Co.*, payable at the *London and County Bank* to the order of Messrs. *Watts & Co.* This bill was indorsed by Messrs. *Watts & Co.*, to the *Leeds Banking Company*, and by the *Leeds Banking Company* to Messrs. *Prange* with the special indorsement, "in need, at Messrs. *Smith, Payne, & Smith.*" This bill became due on the 7th of November, 1864, when it was presented by Messrs. *Prange's* agent at the *London and County Bank*, the place at which it was made payable by the acceptor, On the 8th of November it was returned dishonoured; and on the same day it was presented at Messrs. *Smith, Payne, & Smith's*, and returned by them dishonoured on the same day; and on the 16th of November notice of the dishonour was given to the official liquidator of the *Leeds Banking Company*, which was being wound up.

The second bill was also a three months' bill, and dated the 10th of August, 1864, for £500. It was made between the same parties, and passed through the same hands as the first bill. It fell due on the 12th of November, 1864, and was presented on the same day at the *London and County Bank*, and returned dishonoured on Monday, the 14th of November; on the same day it was presented at Messrs. *Smith, Payne, & Smith's*, and returned by them dishonoured on the same day; and on the 16th of November notice of the dishonour was sent to the official liquidator by Messrs. *Prange*, and this notice the official liquidator received on the 17th of November. The delay of a day was occasioned by Messrs. *Prange's* agent in *London* sending the bill from *London* to Messrs. *Prange* at *Liverpool.*

When the official liquidator received notice of the dishonour of the two bills, he repudiated the liability of the company, on the ground that proper notice of the dishonour had not been given to him.

It appeared that before the bills became due, the drawer and acceptor, who were both customers of the *Leeds Banking Company*, became bankrupt.

Mr. *Druce* for Messrs. *Prange*:—

Messrs. *Prange* are entitled to be admitted to prove in respect of these two bills. They were presented when they fell due at Messrs. *Smith, Payne, & Smith's*, the persons notified by the indorsement, and notice to them was notice to the indorser. "In need," means in case of need, or if occasion should require; and of that the holders of the bills are the persons to judge. Such an indorsement is analogous to an acceptance of a bill payable at a specified banking house, and in such cases it has been held that presentation at the bankers' is notice to the acceptor. *Pearse* v. *Pemberthy* (1), *Smith* v. *Thatcher* (2), *Treacher* v. *Hinton* (3), Bayley on Bills (4). The notice to Messrs. *Smith, Payne, & Smith* includes notice of the dishonour by the acceptor of the bills, as otherwise the bills would never have been presented at the bank notified by the indorsers. Moreover, the *Leeds Banking Company* must have had notice of the dishonour by the acceptors, as both the drawers and acceptors who were customers of the *Leeds Banking Company* became bankrupt before the bills fell due.

If notice to Messrs. *Smith, Payne, & Smith* was not sufficient, it is admitted that as to the first bill there has been no sufficient notice. But as to the second bill notice of the dishonour was given in due time to the official liquidator. As between parties to a bill one day is allowed for each step in presenting and giving notice of dishonour; and where, as in the present case, a day is required for communication between the agent of the holder of a bill and such holder, the same rule allows one day for that purpose.

Mr. *Glasse*, Q.C., and Mr. *Cotton* for the official liquidator:—

We admit the cases cited on the other side, but they do not apply to the present case. There is no such custom as contended that presentation to parties named in indorsement "in need" is presentation to the indorser; and there is no analogy between such a case and a case where the bill is made compulsorily payable at a particular banking house.

The fact that Messrs. *Smith, Payne, & Smith* were named in the indorsement "in need," only constituted them agents of the

(1) 3 Camp. 261.
(2) 4 B. & Ald. 200.
(3) *Ibid.* 413.
(4) 6th Ed. 307.

V.-C. K. 1865 LEEDS BANKING CO.

Leeds Banking Company for payment, and not their agents generally for the purposes of notice; and assuming that presentation at Messrs. *Smith, Payne, & Smith's*, was presentation to the *Leeds Banking Company*, there has been no notice at all given of the dishonour by the acceptors. The notice of dishonour must be a formal notice of the fact, and implied notice is not sufficient.

The notice given to the official liquidator by Messrs. *Prange* was too late even as to the second bill. Admitting that a day is allowed for each step as between the parties to a bill, that rule does not extend to allowing a day as between the agent of the holder of the bill and the holder.

They referred to *Leonard* v. *Wilson* (1) as explaining indorsement in need; and to 1 & 2 Geo. IV. c. 78; 6 & 7 Wm. IV. c. 58; and Byles on Bills (2).

Mr. *Druce*, in reply.

Nov. 14. SIR R. T. KINDERSLEY, V.C.:—

It is contended on the part of Messrs. *Prange* with respect to both the bills, first, that it was not necessary to give to the indorser any notice of dishonour; or, secondly, that if it was necessary, the presentation of the bills to Messrs. *Smith, Payne, & Smith* for payment, operated as a sufficient notice to the indorser.

It is admitted that for the first proposition there is no direct authority; but it was argued that as it has been decided that when an acceptor, by the terms of his acceptance, refers to a particular banker for payment, it is unnecessary to give the acceptor notice of non-payment by that banker; so, by analogy, it ought to be held that it is unnecessary to give the indorser notice of dishonour when, as in the present case, he has, by the terms of his indorsement, referred to a banker for payment. But whatever analogy there may be between the two cases, it cannot go beyond this, that it is unnecessary to give the indorser notice of the non-payment by his own banker; and it cannot lead to the conclusion, that it is unnecessary to give him notice of the bill having been dishonoured by the acceptor

(1) 4 Tyrw. 415. (2) 8th Ed. 251, 265.

V.-C. K. 1865 LEEDS BANKING CO.

On the second point it was contended that, as by the terms of the indorsement the reference to *Smith, Payne, & Smith* was "*in need*," the presentation of the bill to them for payment operated as notice to them of dishonour by the acceptor; because there could be no occasion to present the bill to them for payment, unless it had been already dishonoured by the acceptor, and that notice to them was notice to the indorser, whose agents, as it is contended, they were. It is not very clear to my mind what is the use or efficacy of the words "in need," or "in case of need," in such an indorsement. It has been suggested that they may mean "in case it is necessary to resort to the indorser," or that they may mean, "in case the holder finds it for his convenience to apply to *Smith, Payne, & Smith* for payment." Of the two I should think the former is the more probable meaning. But whatever may be the meaning of those words in an indorsement, I am of opinion that the presentation of the bill to *Smith, Payne, & Smith* for payment, cannot operate as notice of dishonour to the indorser for two reasons :—

First, that the reference to *Smith, Payne, & Smith* by the indorsement, assuming that it constituted them the indorser's agents for payment of the bill, did not constitute them the indorser's agents to receive on his behalf notice of dishonour by the acceptor; so that, even if formal notice of dishonour by the acceptor had been given by Messrs. *Prange* to *Smith, Payne, & Smith*, that would not have been good notice to the indorser.

Secondly, that the mere presenting the bill for payment, even if it had been presented to the indorser himself, would not, *per se*, have been sufficient notice of dishonour by the acceptor. To constitute notice of dishonour of a bill, there must be a *notification*, whether verbal or written, from the holder to the indorser, which conveys to the latter the information of the fact of the dishonour, though it is not necessary that such notification should be in any prescribed form. Notice of dishonour to the indorser means something more than that the indorser has knowledge of the dishonour; that knowledge must be conveyed to him by a notification from the holder. Besides, the effect of the presentation to the indorser, or his agent, is not to give him positive knowledge of the dishonour, but only to lead him to infer it by reason of the improba-

V.-C. K. 1865 LEEDS BANKING CO.

bility that it would be so presented, unless payment had been previously refused by the acceptor. And such inferential knowledge of the fact does not constitute notice of dishonour.

The remaining question relates only to the second bill; for as to the first bill, if notice of dishonour was necessary, and if the presentation to *Smith, Payne, & Smith* did not operate as such notice, it is admitted that there was no actual notice within the time prescribed by the law. But it is contended that as to the second bill there was actual notice within the proper time. Messrs. *Prange's* agent in *London*, who presented the bill for payment, received notice of dishonour by the acceptor on the 14th of November. If on that day, or even perhaps on the 15th, he had sent notice of dishonour to the indorser, so that the latter had received it on the 16th, the notice would have been good. But a day was lost by the agent sending the notice to Messrs. *Prange* at *Liverpool*, and Messrs. *Prange* sending the notice to the indorser at *Leeds*, so that the indorser did not receive it till the 17th. It is admitted that the law allows one day in each step for communication between the parties to a bill, and the question is whether it allows an additional day for the communication from the holder's agent to the holder. I have searched in vain for any authority for the affirmative, and I am of opinion that there is no such rule.

The claims must therefore be disallowed, but there will be no costs.

V.-C. K. 1865 *Nov.* 4, 6.

TALBOT *v.* MARSHFIELD.

Practice—Production—Documents—Sealing up.

An application for liberty to seal up or not to deposit documents, possession of which is admitted by the affidavit of a Defendant who has not been required to answer as to documents, need not be made on the original summons for production, but will be granted on summons by such Defendant, after he has filed his affidavit, without his being required to pay the costs of his summons.

THIS was an adjourned summons, taken out by the Defendants.

The usual order had been made on summons for an affidavit as to documents and production, by the Defendants. In their affidavit

the Defendants had admitted possession of a copy of a letter which was contained in a letter book, but had not by their affidavit stated that they desired to seal up the rest of the book. The Defendants took out the present summons for leave to seal up the book except the part containing the letter in question, and that it might be inspected at the solicitor's office, instead of being deposited at the Record and Writ Clerk's office. The Court made the order applied for, and a question arose as to the costs of the adjourned summons; the question being, whether the Defendants ought to have made the present application on the occasion of the first summons for production, or whether it was properly the subject of a subsequent application, after the affidavit as to documents had been made.

Mr. *J. Hinde Palmer*, Q.C., and Mr. *J. Napier Higgins*, for the Defendants, submitted that the proper course was to apply by a subsequent summons as had been done in the present case, and asked that the costs might be costs in the cause.

Mr. *Glasse* Q.C., and Mr. *A. Dixon*, for the Plaintiffs, contended that the application should have been made by the Defendants on the occasion of the original summons; and that they, not having done so, must pay the costs occasioned by the second summons.

Mr. *J. Hinde Palmer*, in reply.

Cox's Forms (1) and Seton on Decrees (2) were referred to as to the usual form of affidavit, and order for deposit.

Nov. 6. SIR R. T. KINDERSLEY, V.C.:—

I have taken time to ascertain whether there is any regular practice in Chambers on the subject. Where a Defendant has been called upon to put in an answer to the bill, and to set out a list of documents in his possession, and has done so, he must of necessity know when an order for production is applied for, what the documents are, and be able to ask that in the order for production a direction may be introduced, that he may be at liberty to seal

(1) P. 480. (2) P. 1040.

V.-C. K. 1865 TALBOT v. MARSHFIELD.

up such parts of any documents as do not relate to the matters in question, or protecting him from producing any that are privileged. It is his own fault if he omits to procure such direction to be inserted in the order for production; and if he omits to do so, and afterwards applies for an order to give him such protection, he ought to pay the costs occasioned by such application rendered necessary by his own neglect. But where he has *not* been required to answer as to documents, and is for the first time called upon to examine the documents in his possession, by reason of a summons being taken out requiring him to make an affidavit of documents, he may not be in a position on attending such summons, from any previous knowledge of the particulars of the documents in his possession (which may be very numerous), to say whether there be any of them which ought to be considered privileged from production, or portions of them which he is entitled to seal up. And I find that the usual practice at Chambers is that if a party who, for the first time, has been called upon by summons in Chambers to make an affidavit as to documents in his possession, and for production thereof, upon which the common order has been made, subsequently applies by summons, after having made the affidavit, that he may be at liberty to seal up some of the documents, or to withhold from production any that are privileged, the Judge in Chambers makes the order without requiring him to pay the costs of the summons; and this appears to me to be the right course. The costs will, therefore, be costs in the cause.

ROWE *v.* TONKIN.

Pleading.—Demurrer to Part of a Bill.

M. R.
1865
Nov. 2.

It is irregular to demur alone to part of a bill when interrogatories have not been filed and the time for filing them has not expired.

Whether, under the like circumstances, it is irregular to demur to part of the bill and put in a voluntary answer to the rest—*Quære.*

THE bill in this case was filed on the 13th of July, 1865, and served on all the Defendants on the following day. All the Defendants appeared on the 21st of July, and on the same day six of them put in a demurrer to *part* of the bill.

The Plaintiff filed interrogatories on the 28th of July, and now moved that the demurrer should be taken off the file, on the ground of irregularity.

The bill, amongst other things, prayed for an injunction.

Mr. *Southgate*, Q.C. and Mr. *Bevir*, for the motion :—

A demurrer to part of a bill, put in without a plea or answer to the rest of the bill, and before the time for filing interrogatories has expired, is wholly irregular. Under the old practice, when the interrogatories were filed with the bill, a demurrer to part without plea or answer was clearly bad. The point could not then have been argued; and the enactment 15 & 16 Vict. c. 86, s. 12, has not altered the practice. The Defendants ought to have waited to see whether interrogatories were filed or not; if they were filed, a demurrer to part of the bill, and a plea or answer to the rest, might be filed within twenty-eight days after service (1); if they were not, a demurrer alone might be put in: *Burton* v. *Robertson* (2).

That case, however, is no authority for the present demurrer; it was decided expressly on the ground that the time allowed for filing interrogatories had elapsed.

(1) XXXVII. Co. O. r. 4. (2) 1 J. & H. 33.

M. R. 1865 ROWE v. TONKIN.

Mr. *Selwyn*, Q.C., and Mr. *Freeling*, for the demurrer :—

It is not irregular to put in a voluntary answer before interrogatories have been filed: *Anderson* v. *Stamp* (1); and it is submitted that a demurrer to part of the bill and voluntary answer to the rest would have been equally regular. That being so, *Burton* v. *Robertson* shows that a demurrer alone to part of the bill is not irregular.

Under the old practice, the Plaintiff made it part of his prayer, that the Defendant should answer: and then the Defendant was bound to answer all parts of the bill to which he did not demur; but now the Act of Parliament says, that a Defendant is not bound to answer unless he is required: and therefore he may demur without answering, when no answer is required.

If this motion is allowed, it will be impossible for a Defendant to demur to part of a bill till sixteen days have elapsed: in the meantime the Plaintiff may move for and obtain an injunction, which a demurrer would have prevented. In fact, it was with reference to this that the present demurrer was filed.

SIR J. ROMILLY, M.R. :—

I am of opinion that the demurrer is irregular. The difference between this case and that of *Burton* v. *Robertson* is, that the Defendants have not waited for the sixteen days allowed for the filing of interrogatories. I consider that, till the end of those sixteen days, the practice remains the same as it was before the Act of Parliament altered the rules as to pleading. Under the old practice, a Defendant might have put in a demurrer to part of a bill and an answer as to the rest; but he could not have demurred alone to part of the bill; if he had, the Plaintiff might have come to the Court and asked that the demurrer should be taken off the file for irregularity. So, under the present practice, even assuming that before the sixteen days have elapsed, a Defendant may put in a demurrer to part of a bill and a voluntary answer to the rest, still he can not demur alone.

As to that assumption, I am not called on to decide the point, and therefore desire to give no opinion; but I may observe that, if it were so decided, considerable difficulties might arise on the

(1) 34 L. J. Ch. 230.

pleadings. Thus, if a Defendant demurred to part of a bill, and answered the rest, and the Plaintiff then filed interrogatories, could the Defendant rely on his demurrer, or must he answer? Again, suppose he answered. It may be possible for the Court at the hearing, to make out the case on which a Defendant relies, from two answers, one being imperfect and the other complete; but it seems to me that there would be great difficulty in making it out from two documents, one of which is an answer to the whole bill, while the other is a demurrer to part of it.

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I am, therefore, of opinion that, until the sixteen days have elapsed, all that can be done is to assimilate the new practice to the old. The demurrer is irregular, and the motion must be allowed with costs.

In Re HAYTOR GRANITE COMPANY.

M. R. 1865 *Nov.* 11, 13.

Company—Winding up—Companies' Act, 1862, (25 & 26 *Vict. c.* 89, *s.* 158)—*Lease to Company—Claim by Lessor.*

The lessor of a quarry who has granted a lease to a company, incorporated by charter, with the usual covenant for payment of rent—

Held, not entitled, on the winding up of the company, to have any claim entered under section 158 of the Companies Act, 1862, in respect of future rent, when the lease had been assigned to a purchaser.

THE *Haytor Granite Company* was incorporated by Royal Charter in 1830. The charter contained a power of revocation which might be exercised by the Crown on one year's notice being given by a Secretary of State that the company should cease to exist, and provided that at its expiration the letters patent should cease accordingly, that then the affairs of the company should be wound up, the debts paid, the assets converted, and the surplus divided among the proprietors.

By a lease dated the 2nd of March, 1857, and made between *Edward Scobell* of the one part, and the *Haytor Granite Company* (the lessees) of the other part, the said *Edward Scobell* granted to the lessees, their successors and assigns, the exclusive right to work for granite in the limits therein mentioned, for the term of twenty-seven years and a half, at the rent (from and after the

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fourth year of the term) of £275. The lease contained the usual covenant by the lessees for payment of the rent, with power of distress and entry, and power for the lessor to make null and void the said lease on non-payment of the rent or non-performance of the covenants. There was no proviso against assignment.

By an order made by the Master of the Rolls on the 3rd of October, 1863, the company was ordered to be wound up under the provisions of the Companies' Act, 1862. On the 17th of June, 1864, the lease was assigned, with the sanction of the Court, to Mr. *W. Johnson*, by whom the rent was afterwards paid.

The present claim was made by the lessor, Mr. *Scobell*, who took out a summons to be admitted to prove for the amount of the future rent.

The case came on as an adjourned summons.

The 158th section of the Companies Act, 1862 (25 and 26 Vict. c. 89), on which the application mainly rested, provides that:— "In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of all such debts or claims as may be subject to any contingency, or sound only in damages, or, for some other reason, do not bear a certain value."

Mr. *De Gex*, Q.C., for the lessor:—

The present claim is properly made within the 158th section. If no claim is entered on the proceedings the result will be that it will be certified that the Company is wound up, and then under section 111, the Court will make an order that it be dissolved. If the company were to be dissolved without the future rent being provided for, the grossest injustice would be committed; for though the lease has been assigned to a purchaser, that does not relieve the company from their liability under the covenants; nor is it a security to the lessor, for the quarry might be worked out, or the lease might be assigned to a pauper.

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[THE MASTER OF THE ROLLS:—Would it not be the same in Bankruptcy?]

The order of discharge does not relieve the bankrupt from the liability to future rent. There is not a single case in which a covenantee is thus barred of his remedy. The affairs of the company could not properly be declared to be wound up while this liability was undischarged. The words of the section are very large:—'All claims against the company, present or future, certain or contingent"—words not found in the Bankruptcy Acts; and in s. 159 the liquidators are authorized to arrange with persons having any claim "whereby the company may be rendered liable"—shewing that there is no analogy to the case of bankruptcy. As to the alleged hardship of postponing the winding-up of the company, there can be no hardship in a company performing its own engagements. In *Evans* v. *Coventry* (1), which was a case on the winding-up of an Insurance Company, the capital of the company was held to be liable to answer the claims of the insured.

Mr. *Selwyn*, Q.C., and Mr. *F. Harrison*, for the official liquidator:—

The Chief Clerk, in disallowing the claim, acted in conformity with the Act. It involved no injustice, for if a person chooses to enter into a contract with a company which is liable to be wound up, he must take the consequences, which would have been the same if the company had, under the provisions of the charter, been put an end to by the order of the Secretary of State. The remedy of a landlord, as against the tenant or his estate, cannot be extended by a Court of equity. This was decided in *King* v. *Malcott* (2). The accident of the winding-up of the company imposes on the Court the duty of seeing that every just claim against the company is satisfied. The question is—what is a just claim? Would it be just to impound a certain portion of the assets of the company to meet the future rent, not otherwise paid, when no just estimate of the amount can be arrived at? This would be contrary to the spirit of the Winding-up Acts, namely, that all

(1) 8 De G. M. & G. 835. (2) 9 Ha. 692.

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claims should be ascertained at once. Besides, the assignee has paid his rent, and no hardship to the lessor can be apprehended.

Mr. *De Gex*, in reply:—

The case of *King* v. *Malcott* (1) is distinguishable, for there the executor still remained liable, and the legatees might have been compelled to refund. It was there held that it was no part of the lessor's contract to have a sum set apart out of the estate of the lessee. In the present case the lessor does not ask to have a sum set apart out of the assets except as an alternative. He asks that there may be a subsisting company still liable to meet his demand.

Nov. 13. SIR J. ROMILLY, M.R.:—

The facts on which the present question arises are these. The *Haytor Granite Company* took a lease from the present applicant, Mr. *Scobell*, for twenty-seven years and a half in the year 1857, at a rent of £275 a-year. In November, 1863, the company failed, and this Court made a winding-up order. They assigned over the lease to another person, who has duly paid the rent, which has been received by Mr. *Scobell*, but which does not of course exonerate the original covenantors. The application at present before me is to have a sum set apart in order to satisfy the rent as it may become due during the continuance of the term, which in point of fact will be about twenty years from this time. It was strenuously argued by Mr. *De Gex* that the Court would commit the grossest act of injustice if it did not grant this, and that the Courts of equity sit here to administer equity, and not to permit such gross acts of injustice. Unquestionably if the lessor were to be deprived of his rent and his property for the next twenty years, a very gross act of injustice would be perpetrated. It is also contended that the contract is to be performed by the persons who entered into the covenant, and not by others, and that he has a right to compel them to perform it. It is, however, the same thing to him, by whomsoever it is performed, if he is paid.

(1) 9 Ha. 692.

The clause in the Act of Parliament under which he claims, which is the 158th clause of the Companies' Act, 1862, is in these words :—

[His Honour then read the section.]

I confess I am unable to ascertain what the amount is that ought to be set apart, or, in fact, whether anything ought to be set apart. What I have to estimate is, not what the value of £275 a-year may be for twenty years, which would be a very simple thing to do; but what the chance is of the present or some future assignee of the lease not paying the rent to Mr. *Scobell*, the result of which would only be this, that if he is not paid the rent, he will get back the property in such a state as it may be in at that time. I have no evidence before me how far this granite rock is capable of being exhausted, as to which I must have an inquiry if I am to ascertain what the value is. Mr. *De Gex* was totally unable to say what the value was; but he thought it was not unfair to claim the total amount of £275 for the twenty years, which is the claim that has been put in before the Chief Clerk. I am of opinion that that is not a fair and reasonable amount. There is no debt till after the rent has become due. Suppose I were to refuse to dissolve the company at all, which is what I am asked to do, and thereupon all the members who belong to the company should fail, and should die in the course of the next twenty years, it is quite clear that then all claim would be gone. Mr. *De Gex* admits that the lessor took subject to that, because he cannot compel them to keep up the company, and there is no contract with the individual members. Then it is clear that the case of *King* v. *Malcott* (1) would apply, because it is certain that he has not contracted that their assets or their executors shall be liable to pay the amount of the rent, but only that the company shall pay. The value is, in my opinion, wholly incapable of appreciation.

Mr. *Scobell* contracted with the company, not with any individuals; and I am of opinion that he must be taken to have known what the chances of failure were of the persons with whom he contracted. These were three. First, the Queen might have repealed the charter under the advice of the Secretary of State.

(1) 9 Ha. 692.

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That would have put an end to the company at once. Secondly, it might have failed through the death of all the members, so that nobody would be living to represent the company at all, in which case nothing could be obtained. Thirdly, it might become insolvent and be wound up in the Court of Chancery. If Mr. *Scobell* was liable to, and could not complain of, either of the first two events happening, as was admitted in argument, why was he not equally aware that the third was likely to happen, and that this, like many other companies, was liable to fail? Undoubtedly, the Act of 1862, under which this company is wound up, was not the Act in force at the time the contract was made; but there was another Act in force at that time, under which the company could have been equally well wound up, and under which the same result would have happened, although it did not contain this clause for the purpose of estimating contingent liabilities.

I think that Mr. *Scobell* must be taken to have known, when he entered into the contract with the company, that this was one of the possible contingencies, and that either the property would be assigned to some other person who would pay the rent, or else that the lease would come to a determination.

It is impossible for me to ascertain what is the value of the lease. If the granite should become more valuable, it would be beneficial to the lessor that it should be put an end to. I cannot possibly ascertain what sum to fix upon; and taking the other view also, that Mr. *Scobell* was aware what he was about when he contracted with the company, I am of opinion that he has no ground here for any claim at all.

WICKHAM *v.* MARQUIS OF BATH.*

M. R.
1865
June 26.
Nov. 4.

Mortmain—9 Geo. 2, c. 36—Charity—Reservation for Grantor—Attestation—Confirmation by heir.

A grant of lands for charitable purposes does not comply with the provisions of the *Statute of Mortmain* unless the grantor grant, *bonâ fide*, all the interest he has in the property to be conveyed, whether from rents to be received, or from actual possession at the time of the grant.

Therefore, where a man advanced in life, by a deed duly executed, attested, and enrolled, made a grant of real estate, including his dwelling house, to trustees for charitable purposes, subject to a lease made shortly before the grant, at a peppercorn rent for twenty years, determinable on the death of the grantor and his sister, to his said sister, with whom he there resided and continued to reside, and who was acting in concert with him in the matter:—

Held, that the grant was void.

A deed, attested by one witness, though executed and acknowledged for the purpose of enrolment, in the presence of two persons who are parties to and execute the deed, but do not sign the attestation clause, is not a deed *sealed and delivered in the presence of two or more credible witnesses* within the meaning of the *Statute of Mortmain*.

A deed, so attested, executed by the grantor's sister and heiress-at-law after his decease, and purporting to confirm the grant:—*Held*, invalid.

THE object of this suit was to obtain a declaration as to the validity of a deed executed by *Thomas Bunn*, deceased, on the 26th of July, 1850, whereby he granted certain lands, subject to two leases, to trustees, who were the principal Defendants to the suit, upon the trusts therein mentioned for the improvement of the town of *Frome*. The main question in the case was whether the grant was "made to take effect in possession for the charitable use intended immediately from the making thereof, and without any reservation for the benefit of the grantor," according to the provisions of the *Statute of Mortmain*, 9 Geo. 2, c. 36. There was a further question whether a deed of confirmation executed by the grantor's sister and heiress-at-law, *Jane Bunn*, was "sealed and delivered in the presence of two or more credible witnesses,"

* As this case was heard before the commencement of the present reports, the reporter is unable to give a full statement of the facts or a note of the arguments. Besides the points on which the case is reported, another point relating to the farming lease was discussed which does not appear to call for a report and would not be intelligible without a full statement of the facts.

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within the meaning of the Statute. The bill was filed by the residuary devisees and legatees of the will of *Thomas Bunn*.

The facts of the case as to the points on which it is reported are fully stated in the judgment.

Mr. *Hobhouse*, Q.C., and Mr. *Rendall*, for the Plaintiffs.

Mr. *Selwyn*, Q.C., and Mr. *Phear*, for the trustees of the deed.

Mr. *Baggallay*, Q.C., Mr. *J. Pearson*, and Mr. *T. Stevens*, for other parties.

Nov. 4. SIR J. ROMILLY, M.R.:—

This is a suit instituted by the residuary devisees and legatees of the will of *Thomas Bunn*, deceased, two of whom also are the surviving executors of his will, praying a declaration of the rights of the persons interested in the property of *Thomas Bunn*, and also of his sister, *Jane Bunn*, who is since deceased.

The principal Defendants are the trustees created by a deed executed by *Thomas Bunn* in his lifetime, conveying to them certain property at *Frome*, in *Somersetshire*, and the real question in the cause is the validity or invalidity of this deed, and of a subsequent deed executed by his sister *Jane*, in confirmation of it. Their validity or invalidity depends upon whether they have been made in conformity with the provisions of the *Statute of Mortmain*; if not, the residuary devisees and legatees under *Jane Bunn*'s will, or her heir-at-law, are entitled to the property; and the suit is instituted to try these questions.

The deed executed by *Thomas Bunn* bears date the 26th of July, 1850. He was a party to it of the first part; the first nine Defendants on the record, and the three Plaintiffs, and three other persons who have disclaimed the trusts or have since died, were the parties of the second part. It recited the desire of *Thomas Bunn* to improve the town of *Frome*, and it witnessed that for effecting this purpose *Thomas Bunn* conveyed to the parties thereto of the second part certain freehold messuages and hereditaments, therein particularly described, subject to a farming lease of the 7th of October, 1846, and to a lease to the grantor's sister of the 1st of May, 1850, to hold to the trustees in fee upon trust

to collect the rents and profits of the lands and hereditaments by their treasurer, or by a proper officer to be appointed by them, and after defraying the incidental expenses, to lay out the remainder in supplying water to the town of *Frome*, in widening the streets, in the formation of playgrounds for children, and in effecting various other matters for the town of *Frome*, which are very particularly described in the deed. The deed also contained a clause for the appointment of new trustees when the number should be reduced to five. The deed was duly attested by two witnesses, and enrolled in Chancery within six months after its execution, and *Thomas Bunn* did not die until long after twelve months had elapsed from the date of its execution. The forms of attestation, enrolment, and acknowledgment by the grantor have been fully complied with, but the validity of the deed depends upon whether according to the true construction of the *Statute of Mortmain* the lands vested in possession on the execution of the deed; and, if not, whether it must not be considered to have been an evasion of the provisions of that Act.

The lands which the deed purports to convey, comprise all the real estate in which *Thomas Bunn* had any interest whatever, including the house in which he then lived, and continued to live with his sister after the grant.

The lease of the 1st of May, 1850, was made by *Thomas Bunn*, and by it he demised to his sister *Jane*, the hereditaments afterwards included in the deed of the 26th of July, 1850, to hold to her for twenty years, at a peppercorn rent, determinable on the death of the survivor of himself and herself. At this time *Jane*, the younger of the two, was eighty years of age. They lived together until the death of *Thomas Bunn*, which took place in May, 1853. Previously to that event he had made his will, by which after referring to this indenture of July, 1850, and stating that doubts were entertained as to its validity, he directs that if any one shall contest the deed, or attempt to defeat the settlement he had made of his property, the whole of his lands and hereditaments not so applied should belong to and vest in *Her Majesty the Queen* and the *Prince Consort*, and their heirs for ever; and further, in case they should reject such devise, then he gave £600 to his executors to enable them to obtain an Act of Parliament to confirm his deed

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of July, 1850, and the settlement of his lands. Subject to these, and certain other directions and legacies, the testator gave any of his property that might remain to his sister, *Jane Bunn*, her executors, administrators, and assigns.

Before proceeding to consider the rest of the case, it will be convenient to dispose of that portion of it which depends on this will. *Her Majesty the Queen*, in whom the whole interest in this devise was vested, has, by a grant under her sign-manual of the 21st of July, 1863, granted all the hereditaments to the Plaintiffs and their heirs, without thereby impeaching or affirming the trusts of the indenture of the 26th of July, 1850, but simply for the purpose of disclaiming all interest in the devise. The effect of this is exactly the same as if this devise had not been made by the testator.

The next direction in the will, to obtain an Act of Parliament to render the trusts of the indenture of July, 1850, valid, is also inoperative. Of course there is no question but that Parliament, if it pleased, might pass an Act of Parliament making these trusts valid, as they might pass an Act to take away a field from one person and give it to another; but this direction contained in the will imposes no duty or obligation on the executors or trustees to apply for such an Act. And as no such Act has been applied for, and as, if it were, in all probability Parliament would reject any bill introduced for that purpose, I must proceed to consider the validity of the deed as it stands, unconfirmed by any extraordinary interposition of the Legislature.

I think the real question is, whether the lease of the 1st of May, 1850, being less than three months before the execution of the deed of July, 1850, is not a colourable evasion of the statute of the 9th Geo. 2. The formalities prescribed by that statute have been complied with; but the question is whether the provision which enacts that a gift shall be void unless it be made to take effect immediately, has been complied with in this case. I am of opinion that it has not, and that the deed is void.

I hold it to be quite clear that a conveyance of lands, to be held in trust for the grantor during his life, and upon his death to be applied for the support of a particular charity, would be void under the provisions of this Act. It would, I think, amount to the same

thing, and be subject to the same consequences, if this were done by two deeds, and through the instrumentality of two sets of trustees. For instance, if the grantor by the first deed granted lands to trustees in trust for himself for life, and subject thereto as he should by deed or will appoint, and then by a second deed appointed the reversion in fee irrevocably to other trustees to hold for certain charitable uses, this, I apprehend, would be bad. It is true that where a reversion in real estate is vested in the grantor, who has no present interest in the property, the irrevocable and immediate conveyance of that reversion to trustees in trust for charitable purposes, would probably be held to be valid, but not, I apprehend, if the reversion had been created by the grantor for the purpose of allowing himself to retain the enjoyment of the property during his life. In many of these cases it would be a question of fact to be determined from the evidence laid before the Court; but assuming it to be established by the evidence to the satisfaction of the Court that the grantor had at any time divided the fee simple into a life estate and a reversion, or had carved out of the fee simple such an interest as would outlast the life of the grantor, and that he had done this with the view of securing to himself the beneficial interest in the property during his life, and of disposing of it after his death for charitable purposes, in such a case I am of opinion that the grant in favour of the charity would be an evasion of the provisions of the *Statute of Mortmain*, and as such, must be held to be void by this Court. Were it not so, it is obvious that the real object of the statute would be easily evaded, and the words in it to which I have referred would be wholly inoperative.

If I am right in this, the question is whether the lease of the 1st of May, 1850, falls within the principles I have endeavoured to enunciate, and I am of opinion that it does. Three months before the grant of the charity, the grantor, an old man of the age of eighty-three, without children, and living with his only near relation, a sister of the age of eighty, makes a lease of the hereditaments in question to his sister for twenty years, at a peppercorn rent, after which they continue to live together and enjoy the property until his death. It was reasonably certain that the lease would exceed his life, and it was equally certain the sister would not attempt to evict her brother during his life; and it seems

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probable, had she attempted to do so, she would have failed. In truth, the concord between them to accomplish the wish of the brother is established by the evidence. Here there is a lease which provides for the enjoyment of these messuages and hereditaments during the life of the brother and sister, and then, subject to their interest therein, it is given to trustees for charitable purposes. This is, in my opinion, not a case where, in the meaning of the words of the statute, it can be said with truth that the grant is made to take effect immediately on the execution of the deed. That means, as I understand, that the grantor shall give the whole interest he has in the thing granted. If the gift to the charity was intended to be an annuity or rent-charge, the grant of it must be of the whole interest in that annuity or rent-charge. If the thing granted be lands, then the statute means that the whole interest which the grantor has in the lands should be conveyed, not the whole interest remaining in him at the exact date of the grant, after deducting his previous grants to secure benefits to himself, but the whole interest he had at the time when he first conceived and commenced the plan of benefiting the charity.

If this be correct, then immediately another question arises as to what is included in these words: "the whole interest in the thing granted." I think that when lands are conveyed these words mean the whole interest that a landlord usually possesses in his lands, which includes the rents receivable from the tenants. It is clear that if *A* agree to sell to *B* his estate of *W*, this does not mean that the rent under existing leases is to be retained by the vendor; but in the absence of any stipulation on the subject, it means that the purchaser is to be put into possession of the estate and into the receipt of the rents at the date of the completion of the purchase. In like manner if a man grants land to a charity, the statute requires that the grant shall take effect in possession immediately, not leaving the grantor to receive the rents under existing leases during his life, but putting the grantee in immediate and entire possession of the thing granted as far as the grantor is able to do so. [After referring to a point which had been raised in respect of the farming lease, his Honour continued:—] The only safe rule seems to me to be that the grantor, in order to comply with the provisions of the statute,

must grant all the interest he *bonâ fide* has in the property to be conveyed, whether from rents to be received, or from actual possession at the time of the grant, and must not in contemplation of such grant for charitable purposes have deprived himself previously of any portion of this interest in favour of another, under any agreement, either expressed or implied that he, the grantor, is to derive any benefit from the portion so previously conveyed. This grant of July, 1850, is defective in respect of these propositions. I am of opinion, therefore, that the deed of the 26th July, 1850, is void as being contrary to the provisions of the *Statute of Mortmain.*

I have then to consider what effect the acts of the sister *Jane,* which have been done since the death of her brother, have had towards confirming the grant intended by the brother, and affecting the destination of this property in the manner directed by him; in other words, whether the acts of *Jane Bunn,* the sister, since the decease of her brother, have rendered valid the trusts of the deed of July, 1850, or have created new trusts to the same or a similar effect.

Jane Bunn, being the sister of *Thomas Bunn,* was his heiress at law, his sole next of kin, and residuary devisee, and legatee of all his property, which could not be applied for the performance of the trusts of the charity pointed out by him. Four months after her brother's death, *Jane Bunn* executed the following indenture. It bears date the 16th of September 1853, it was expressed to be made between herself of the first part, the three Plaintiffs and *Jane Bunn* of the second part, *James Coller* of the third part, and the Defendant *Daniel Anthony* and all the persons who are parties of the second part to the indenture of the 26th of July, 1850, except *William Fernie* who had died, were parties to it of the fourth part. It recites the will of July, 1850, and the will of the testator; it recites that *Jane Bunn* had been advised that the trust thereby declared was absolutely void, and that the clauses contained in the will of *Thomas Bunn* relating thereto were inoperative, and that she was entitled absolutely to the hereditaments contained in the deed of July 1850, as heiress at law of *Thomas Bunn,* or that she and the Plaintiffs were seised thereof in fee simple in trust for herself.

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It further recited that she was desirous to give effect to her brother's wishes as expressed in the indenture of July, 1850, and the indenture then witnessed, that in order to give effect to that intention, she, *Jane Bunn*, and the Plaintiffs, conveyed to *James Coller*, his heirs and assigns, all the messuages and hereditaments comprised in the indenture of the 26th of July, 1850, to the use of the parties thereto of the fourth part, their heirs and assigns, and upon trust to receive and collect the rents of the said hereditaments by their treasurer, or other proper officer, and the deed then repeated all the trusts contained in the deed of the 26th July, 1850. This indenture appears on the face of it to have been attested by one witness only, but two of the Plaintiffs who executed the deed at the same time with *Jane Bunn* were present at the time she executed it, though they did not sign any attestation clause. At the same time *Jane Bunn* acknowledged the deed before the same two Plaintiffs, for the purpose of enrolment, which accordingly was done in Chancery on the following day.

The first question is, was this deed attested by two witnesses as required by the *Statute of Mortmain?* In all other respects the forms required by the Act were complied with. The deed was duly enrolled, and *Jane Bunn* survived the twelve months required by the statute.

I am of opinion that this last deed was not properly attested by two witnesses, as required by the statute. What is meant by attesting a will or a deed? It means, as I understand it, that one or more persons are present at the time of the execution for that purpose, and that as evidence thereof they sign the attestation clause, stating such execution. The fact that any number of persons were present when *Jane Bunn* executed the deed would not comply with the provisions of the statute, if they did not sign the deed as witnesses attesting such execution. Were it otherwise, all the cases on powers which require the strict performance of the condition attached to the exercise of the power would have been incorrectly decided; in truth, no attestation at all of the deed would be necessary, if any sufficient number of persons were present at the time when the deed was executed, although their presence was without any object relating to the subject of the

deed. In this case, it is supposed that a difference is to be found in the fact that the Plaintiffs *Dawe* and *Wickham*, who were present when *Jane Bunn* executed the deed, executed it also themselves; but in my opinion this makes no difference. They did not execute the deed *eo intuitu*—that is, they did not sign the deed for the purpose of attesting the execution of *Jane Bunn*, but for the purpose of conveying any interest they had, or might be supposed to have, in the property, and this cannot, in my opinion, be converted into attestation of *Jane Bunn's* execution. In fact, were it otherwise, the cases decided as to the execution of powers would also be wrong, and the *Statute of Mortmain* would be easily evaded. Three tenants in fee simple of an estate might convey it to a charitable institution without any attestation at all in the ordinary sense of the word, because, according to the argument, if valid, of the Defendants who are the trustees, any two of the grantors might be regarded as witnesses of the execution of the deed by the third, provided they all executed the deed at the same time, and in each other's presence. The execution of this deed, therefore, in my opinion, has only been attested by one witness; and, if this opinion of mine be correct, it follows that the omission of the attestation by the second witness is a violation of the provisions of the statute, and, in my opinion, this deed also is void.

It is further to be observed that, notwithstanding this deed, *Jane Bunn* enjoyed the property as long as she lived, which was until the 10th of December, 1862, when she died, at the age of ninety-three. She had previously made a will making certain specific devises, and making four persons her residuary legatees, three of whom, and the legal personal representative of the fourth, are Defendants to this bill; but by this will she did not dispose of the property included in either of the deeds of the 26th of July, 1850, and the 16th September, 1853.

I am therefore of opinion that the hereditaments comprised in these deeds passed to the heir at law of *Jane Bunn;* and as the certificate of the Chief Clerk establishes that *Charles Kelson*, the Defendant, is such heir at law, he is entitled to a declaration accordingly in his favour. The costs of all parties must be paid out of the estate in dispute.

M. R.
1865
Nov. 21.

BOSTOCK v. FLOYER.

Trustee—Liability—Fraud—Solicitor.

A trustee is liable for the loss of a trust fund caused by the fraudulent act of his solicitor, although in employing such solicitor he may have exercised ordinary care and discretion.

THE Plaintiff Mrs. *Bostock*, at the time of her marriage with Mr. *Robert Bostock* in the year 1833, was absolutely entitled to the sum of £400, invested on the security of a mortgage, in the name of the Rev. *R. C. Wilmot*, and held by him upon a parol trust for her separate use. The mortgage was paid off in the year 1853; and, thereupon, Mr. *Wilmot* handed the money which had come into his hands to his solicitor, Mr. *Conyers*, for the purpose of re-investment. Mr. *Conyers* was a solicitor of good repute and extensive practice, and amongst many other offices, held that of steward of the Manor of *Beverley Water Towns*. He professed to invest the sum on a mortgage of certain copyholds of that manor, and deposited with Mr. *Wilmot* a bundle of deeds and documents relating to the title, including a document which purported to be a copy of the Court Roll, and to show that at a Court held on the 20th of April, 1853, one *J. P. Stephenson* made a conditional surrender of the copyholds in question to the Rev. *R. C. Wilmot*, to secure the repayment to him of £400 with interest. There was not, however, any receipt for the money alleged to have been advanced to *Stephenson*.

At the last-mentioned date, *J. P. Stephenson* was the actual tenant on the Court Rolls of the copyholds purported to have been surrendered by him.

Mr. *Wilmot* died in the year 1856, having by his will, dated 27th January, 1848, appointed the Defendant his executor.

Conyers acted as solicitor to the Defendant up to the 8th of October, 1863, when *Conyers* died.

The stipulated interest was regularly paid to the Plaintiff through *Conyers*, up to the time of his death.

It did not appear that anything occurred in the lifetime of *Conyers*, which was calculated to raise any doubts as to his

integrity; but soon after his death, it was discovered that he had been guilty of gross fraud: that he had never advanced the £400 to *Stephenson*, and that no Court had been held on the 20th of April, 1853, nor any surrender of the copyholds made by *Stephenson*.

Robert Bostock, the Plaintiff's husband, died in 1857.

The bill was filed for the purpose of having the sum of £400 made good out of the estate of Mr. *Wilmot*. The Defendant admitted assets.

Mr. *Hobhouse*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiff.

Mr. *F. O. Haynes* (Mr. *Selwyn*, Q.C. with him), for the Defendant:—

A trustee is not liable for the criminal fraudulent act of a person whom he employs, provided he has himself exercised the same care and solicitude which he would have done for himself; *Lewin* on Trusts (1), *Jones* v. *Lewis* (2). The fund has in this case been lost by the criminal act of a person, whose integrity there was no reason to doubt; and the only way in which the fraud could have been detected, would have been by employing another solicitor to search the Court Rolls, which was quite out of the question. The loss ought, therefore, to fall on the person who owns the fund, just as if it had been caused by *vis major*.

So at common law, a master is not liable for the criminal or spiteful acts of his servant beyond the scope of his ordinary employment: *M'Manus* v. *Crickett* (3).

Further, in the present case, the Plaintiff received the interest from *Conyers:* she cannot, therefore, complain that he was employed by her trustee, against whom no wilful default is even alleged.

SIR J. ROMILLY, M. R.:—

The case is too clear for argument; the liability of the trustee is a matter of everyday occurrence in the Court. If the trustee had handed over the £400 to his solicitor, and he had not invested it at all, but simply retained it for his own use, there

(1) 4th Ed. 224. (2) 2 Ves. 241. (3) 1 East. 106.

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could be no doubt of the trustee's liability. It was argued, however, that the criminal act of the solicitor made a difference. Now, what took place was this: The solicitor, being steward of a manor, fabricated (the act did not seem to amount to forgery), a surrender of actual copyholds by an actual tenant on the rolls; but he did not give to his client a receipt for the money to secure which the surrender purported to be made; and on reference to the Court Rolls, the whole thing was found to be a fiction. Now, I had before me a case connected with the *Roupell* forgeries, in which trustees having occasion to invest a large sum of money, applied to their solicitors to procure for them a good freehold security. The solicitors, exercising every possible precaution, found what appeared to be an unimpeachable security on freeholds vested in *A B* in fee simple; but the title to which depended on a forgery by *A B*. In that case I had considerable doubt whether the trustee could be made liable for the loss occasioned; but I was not called on to decide the point. There is, however, the greatest difference between that case and the present, where the trustee has himself chosen and employed the person who has committed the crime.

Again, if the analogy of master and servant applies to this case, the trustee must be held liable, for the wrong was committed in the ordinary course of the solicitor's employment; but I do not think that the analogy applies here. This is simply the case of a person employing his servant to do an act, and the servant deceiving him; and any loss so occasioned must fall on the employer, and not on the *cestui que trust*.

Of the two innocent persons, therefore, one of whom must suffer by the wrongful acts of the solicitor, the loss must fall on the trustee who employed him, and did not take all the precautions he might have taken against being deceived. The fund must be replaced with interest at 4 per cent.

WARD *v.* CARTTAR.

M. R.
1865
Nov. 21, 23.

Solicitor and Client—Mortgagee in Possession.—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27, *s.* 3.)

A solicitor who pays off a mortgage debt due from his client, must be taken to act as the agent of the client, and not on his own behalf; and if he receives the rent of the mortgaged property, the possession is that of the client, and the solicitor cannot be charged with wilful default; nor will the statute run against the client.

EDWARD STAFFORD, by his will dated the 23rd of September, 1818, devised a freehold house, No. 9, *Union Street*, in *East Greenwich*, unto and to the use of his wife *Bessy*, for her separate use during her life, and after her decease, amongst his sons and daughters and his grand-daughter, as tenants in common in fee, and he appointed his wife sole executrix thereof. The testator died in 1829, and his widow thereupon entered into possession of the house, which was subject to a mortgage created by the testator on the 15th of March, 1828, for the sum of £40 and interest.

The testator's widow died in 1836, and shortly after her death the Plaintiff, *Maria Ward*, became administratrix of the testator's estate, with the will annexed. She employed the Defendant *Carttar* as her solicitor, and was advised by him that she ought, as such administratrix, to sell the house, pay off the mortgage, and divide the surplus amongst the persons beneficially entitled. With the view, as he represented, of facilitating this arrangement. *Carttar*, in August, 1836, paid off the mortgage with his own money, but took no assignment of the mortgage debt or security. The house was put up for sale by auction, but was bought in; and, difficulties connected with the title having been subsequently discovered, the sale was not further proceeded with. *Carttar* continued to act as the solicitor of the administratrix, and he received the rents of the house down to Michaelmas 1841, about which time he became bankrupt.

In 1843 the bankruptcy was annulled, and on the 27th of January, 1843, *Carttar* executed an assignment of all his estate and effects to trustees, of whom the Defendant *Pugh* was the

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survivor, for distribution amongst his creditors. The trustees took an assignment of the mortgage of 1828 on the 11th of September, 1843, and soon afterwards they insured the house, and also appeared to have made some arrangements with the tenant respecting improvements and other matters; but it was not shewn that the tenant distinctly recognised them as his landlords till the 24th of September, 1844, when a settlement was made between them as to the rents which had been in arrear since Michaelmas, 1841. The trustees had ever since continued in receipt of the rents.

The bill in this suit was filed on the 24th of March, 1864, and prayed for an account of the rents and profits, and for redemption. The Plaintiffs were the persons entitled to the remainder in fee under the will of *Edward Stafford;* the Defendants were *Carttar* and *Pugh*. *Carttar* disclaimed all interest in the property. *Pugh*, by his answer, admitted that he had received rents sufficient to satisfy the mortgage debt and interest, but pleaded the *Statute of Limitations*.

Mr. *Southgate*, Q.C., and Mr. *W. W. Cooper*, for the Plaintiffs, contended that the trustees must be taken to have been in possession only since the 24th of September, 1844.

Mr. *Hobhouse*, Q.C., and Mr. *G. N. Colt*, for *Pugh*, contended that possession had been taken by *Carttar;* or, if not by him, by the trustees, in September, 1843, more than twenty years before bill filed. They referred to 3 & 4 Wm. 4, c. 27, s. 3.

Mr. *Bilton*, for *Carttar*.

SIR J. ROMILLY, M.R., after stating the facts, continued:—

In paying off the mortgage of 1828, *Carttar* must be taken to have acted as the agent of the devisees, and not on his own behalf. At that time there was an account between *Carttar* and the devisees: on the one hand, *Carttar* received the rents of the house; on the other hand, he did work, or gave time and trouble on their behalf, for which he was entitled to be remunerated. If then the account had been taken in this Court between the parties, it would have been taken as against an agent, and not

as against a mortgagee in possession; for if a solicitor, with or without the consent of his client, pays off a mortgage debt of his client, he does not thereby alter the relation between them, nor, if he receives the rents, can he be accounted a mortgagee in possession. Down to 1841, when *Carttar* became bankrupt, the possession was, consequently, that of the clients. Nor did the bankruptcy make any difference: and if an account had been taken between the parties in 1843, when the bankruptcy was annulled, *Carttar* could not have been charged with wilful default in respect of the non-receipt of rents from Michaelmas, 1841.

In 1843 the assignment to *Pugh* and his co-trustees took place, and, in September of the same year, the trustees took an assignment of the original mortgage security. If, at that time, the state of the account between *Carttar* and his clients was such that nothing was then due to him from them, he could not have taken the assignment for himself, but only as trustee for them; and, therefore, if the balance was against *Carttar*, *Pugh*, as his assignee, could not stand in any better position. Thus, even if possession had been taken in 1843, *Pugh* could not have had the benefit of the *Statute of Limitations* without an inquiry on this point. But I am of opinion that possession was not taken till September, 1844. The circumstance of the trustees insuring the property did not shew that they were in possession; a mortgagee out of possession might do that; and the only question which could arise would be whether he would be allowed the amount in account with the mortgagor. As to the arrangements said to have been made with the tenant, if the latter had recognised the trustees as landlords, that might have done; but the evidence does not amount to that, and the Plaintiffs are therefore entitled to a decree.

Minute.—The Plaintiffs, waiving all accounts against the Defendants, let the Defendants re-assign the property comprised in the mortgage to the Plaintiffs.

M. R.
1865
Nov. 6, 9.

ROBINSON *v.* CHARTERED BANK.

Company—Transfer—Veto—Directors—Discretion.

By the deed of settlement of a banking company it was declared that no person should be entitled to become a transferee of a share unless he was approved by the Court of Directors:—

Held, that the Court must exercise its power reasonably, and would be controlled by a Court of Equity.

Whether it is a reasonable ground of objection that the proposed transferee is the nominee of a rival bank with which the shares have been deposited as security—*Quære.*

DEMURRER—The Bill was filed by *G. P. Robinson* and the *Alliance Bank*, as Plaintiffs, against the *Chartered Mercantile Bank of India, London*, and *China*, and contained the following statements:—

That both the banks were incorporated companies. That the Plaintiff *Robinson*, in November, 1864, deposited with the *Alliance Bank* the certificates of seventy-five shares held by him in the *Chartered Bank* by way of security for money advanced by the *Alliance Bank*, and agreed to execute a valid transfer of the shares to the *Alliance Bank*, or its nominees, when required to do so. That the deed of settlement of the *Chartered Bank* contained the following articles as to the transfer of shares:—

"ART. 48. Subject to the provisions of these presents, any shareholder may sell and transfer all or any of his shares to any other person approved by the Court.

"ART. 49. No person not being a lawful claimant of a share shall be entitled to become a transferee of a share, unless and until he be approved by the Court."

That in the month of July last the *Alliance Bank* instructed their stockbrokers, Messrs. *Whitehead*, to sell the said shares, and, in order to facilitate transfers to the several purchasers, to take a transfer of all the said shares from the Plaintiff to Mr. *J. Whitehead*, one of the firm of stockbrokers. That the *Chartered Bank* refused to give the stockbrokers a form of transfer to Mr. *J. Whitehead*. That the solicitors of the *Alliance Bank* thereupon

wrote to the secretary of the *Chartered Bank* to the following effect:

"Our clients have applied at the *Chartered Bank* for a form of transfer of the shares referred to, and their broke was informed by you that the directors declined to allow any transfer of Mr *Robinson's* shares. We now beg to inquire the reason of such refusal."

That the solicitors of the *Chartered Bank* sent an answer setting out the two clauses, 48 and 49, of the deed of settlement, and saying:

"We have advised the directors that the last clause entitles them to withhold approval of any transferee, and consequently to refuse the transfer mentioned in your letter, and that they are entitled to do so without assigning any reason. The directors have decided to act on our opinion."

The bill submitted that no unnecessary obstacles ought to be placed in the way of disposal by shareholders of their shares, and that any disapproval ought to be of a particular proposed transferee, and ought to be accompanied by reasons; and stated, that no just ground of exception existed to the said Mr. *J. Whitehead* as transferee, and that by the refusal to allow the said proposed transfer to Mr. *J. Whitehead*, or any other transfer of the said shares, the Plaintiffs were damnified. And the bill prayed that the *Chartered Bank* might be decreed to approve, by its Court of Directors, of the *Alliance Bank*, or of some proper person or persons to be nominated by the *Alliance Bank* as entitled to become a transferee; and that the *Chartered Bank* might be restrained from refusing to allow any transfer of the shares out of the name of the Plaintiff *Robinson*, and from refusing to allow the transfer of the said shares to Mr. *Whitehead*, or the *Alliance Bank* or its nominees.

To this bill the Chartered Bank demurred for want of equity.

Mr. *Selwyn*, Q.C., Mr. *Baggallay*, Q.C., and Mr. *Bowring*, in support of the demurrer:—

The Court of Directors have a right under the deed to refuse

M. R. 1865 ROBINSON v. CHARTERED BANK.

any particular transferee, and are not bound to give their reasons, which it might be very inconvenient and offensive to give. If you say that the directors are acting improperly, you can appeal to the shareholders, or apply for a mandamus, or bring an action for damages, but do not come to this Court, which has no jurisdiction: *Foss* v. *Harbottle* (1). The Plaintiff, *Robinson*, is a shareholder, and bound by the deed of settlement, and in the absence of fraud or an improper motive, which are not alleged, the directors can exercise an absolute discretion, and are not bound to give reasons: *Inderwick* v. *Snell* (2). To grant such an injunction as this would be to establish a new principle of equity. Even if there could be an equity, the Plaintiffs would be bound to shew improper conduct; as, for instance, by a refusal of two or three transferees. Here they simply decline to admit the nominee of a rival bank, which is quite reasonable. There is no allegation that the Defendants have refused to transfer to any one whatever, and the letter of their solicitors has been misconstrued.

Mr. *Hobhouse*, Q.C., and Mr. *Westlake*, in support of the bill:—

We say that they do refuse to transfer to any person whatever, and insist on keeping Mr. *Robinson* a shareholder, which they have no right to do. As to the suggestion of a rival bank, the *Alliance Bank* is merely a mortgagee seeking to realize its security. The Defendants are bound to give their reasons for refusing a transfer, and cannot act arbitrarily. Such conduct is improper, and forms a ground for the interference of this Court. How many nominees must be refused in order to induce the Court to interfere?

Mr. *Selwyn*, in reply.

SIR J. ROMILLY, M.R., after stating the facts averred by the bill, and observing that he was not at all clear what was meant by the words "lawful claimant" in the 49th article of the deed of settlement, continued:—

The question is, whether the *Chartered Bank* can be compelled to approve of a person as transferee who in all other respects is a

(1) 2 Hare, 492. (2) 2 Mac. & G. 215, 14 Jur. 727.

fit person, except that he is the nominee of a rival bank. But though this is the question to be tried, it is not very clearly raised upon this bill by the demurrer. [His Honour then read the correspondence, and continued:—] I think the letter of the solicitor of the *Chartered Bank* amounts to a statement by the Defendant company, that they will not allow any transfer of their shares at all. The Plaintiffs aver that there is no just ground of objection to the transferee, Mr. *Whitehead*, and that by the refusal of the company, through its directors, to allow the proposed transfer they are deprived of the enjoyment of their property. During the argument of this case I entertained no doubt at all that the company must exercise their powers reasonably, and consequently that a refusal to make any transfer at all to anybody would not be a reasonable answer. Whether it would be so with respect to the nominee of a rival bank, who might thus be enabled to investigate the concerns of the Defendant company, or the like, I do not mean now to express an opinion; but, having considered that, and thinking the demurrer was bonâ fide filed for raising that question, what I propose to do is this: I propose to overrule the demurrer, to give no costs in it, but to reserve the costs until the hearing, to abide the result of the cause. I shall then be able to ascertain upon the hearing of the cause whether that is really the question to be determined; and if so, to consider what decision the Court should come to on the subject. In effect, I reserve the benefit of the demurrer until the hearing.

BOVILL *v.* GOODIER.

Practice—Patent—Particulars of Objections—15 & 16 *Vict. c.* 83, *s.* 41.

In a suit to restrain the infringement of a patent, the Defendant will not be required to deliver particulars of his objections to the patent where replication has been filed and the Court has refused to direct issues.

THIS was a suit to restrain the infringement of a patent.

The Defendant by his answer raised the four usual defences—want of novelty, prior user, invalidity of the specification, and non-

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infringement—in the same language which would be used in pleas of the like nature at common law.

The Plaintiff then applied to the Court to direct issues for the purpose of determining the questions so raised; this was refused.

Afterwards replication was filed, and the Plaintiff then took out a summons at Chambers for an order directing the Defendant to furnish particulars of the objections to the patent on which he meant to rely at the hearing. This was adjourned into Court.

Mr. *Baggallay*, Q.C., and Mr. *Druce*, for the Plaintiff:—

Since the Act 25 and 26 Vict. c. 42, the Court cannot order the validity of the patent to be tried at common law, but must determine the question itself. In order to avoid the expense of the case being twice tried here, it is necessary that the Defendant should furnish the particulars we require. Otherwise the Plaintiff and Defendant will each be obliged to get up all their evidence for the hearing, lest the balance of evidence should favour his opponent; and after all this has been done, the only use to which it can be turned will be to enable the Court to decide whether or not to direct issues; if the Court does direct them, the whole of the evidence will have to be gone into again, and there will be, in fact, two trials. Further, it is impossible to obtain this information by means of interrogatories; it is no part of the Plaintiff's case, but simply the Defendant's evidence in support of his pleas. The Court ought therefore to follow the analogy of the course at common law, under 15 and 16 Vict. c. 83, s. 41.

Mr. *Selwyn*, Q.C., and Mr. *Little*, for the Defendant, were not called upon.

SIR J. ROMILLY, M.R.:—

The argument I have just heard is sufficient to convince me that it would be improper to grant this application in the present instance. Mr. *Druce* said that the information now sought from the Defendant could not be obtained by the ordinary mode of discovery in equity, and by reason of this the Plaintiff came to ask for that to which he was not entitled according to the usual practice, simply

because such information was sometimes given at common law. Again, it was said that the Plaintiff would be obliged at the hearing to bring the whole of his evidence before the Court; but that was what the Defendant was asked to do. It was true that an issue was not granted *ex debito justitiæ*, but on the weight of the evidence adduced at the hearing; at the same time, if the Plaintiff had wished to know the case on which the Defendant meant to rely at the hearing, he might have given notice of motion for decree; the Defendant's affidavits would have shewn his case, and the Plaintiff would have had an opportunity of answering them. Instead of this, the Plaintiff filed replication, and thereupon endeavoured to avail himself of the procedure at common law, referring to the 15 and 16 Vict. c. 83 (a statute which relates exclusively to trial at common law, and the procedure therein), and admitting, too, that he was seeking discovery to which he was not entitled in equity. On that point, however, I wish to express no opinion.

[His Honour added that this decision must not be taken to apply to cases where issues had been granted; in such cases he had himself ordered particulars of objections to be furnished.]

V.-C W.

1865

Nov. 14.

DAW *v.* ELEY.

Practice—Patent—Particulars of objection—15 & 16 *Vict. c.* 83, *s.* 41.

In a suit to establish the validity of a patent, where the patent is impeached on the ground of want of novelty and prior user of the invention, the Defendant will not be allowed, in the course of the hearing before the Court without a jury, to introduce evidence of prior user not disclosed by the particulars of objection, although such evidence may have only come to his knowledge since the delivery of the particulars of objection.

Semble, that the Court will give the Defendant leave, on short notice of motion, to amend his particulars of objection, so as to introduce such newly-discovered evidence.

THIS was a suit for the purpose of restraining an alleged infringement of a patent, and in the course of the hearing upon motion for decree, with witnesses examined on both sides as upon a trial before the Court without a jury, a question arose as to the right of the Defendants to give in evidence, for the purpose of invalidating the patent, acts of prior user, the time and place of which had not been disclosed by the particulars of objection.

The patent, of which the provisional specification had been filed on the 4th September, 1861, was taken out by *François Eugène Schneider*, and assigned by him to the Plaintiff. The Defendants, Messrs. *Eley*, denied the alleged infringement, and also contested the validity of the patent, on the ground that it was bad for want of novelty, and also bad upon the terms of the specification.

The Plaintiff moved for an interlocutory injunction before the Long Vacation, and the motion was then, by consent, ordered to be turned into a motion for decree, with liberty to apply for trial of issues with the hearing; particulars of breaches and objections, to be delivered, and witnesses to be examined *vivâ voce*. No issues were settled, but particulars of breaches were delivered by the Plaintiff. The Defendants delivered their particulars of objection, of which 1, 2, 3, and 4 were in effect that *Schneider* was not the first and true inventor; that the invention was not

new on the 4th of September, 1861; that it was not a new manufacture for which a patent could lawfully be granted; and that the specification did not sufficiently ascertain and distinguish that portion which was claimed to have been invented by *Schneider*, or as being new, and that which was not. 5. That the matters claimed as inventions in the said specification were in common knowledge of men in trade for the manufacture or sale of cartridges previously to the date of the patent; as instances, these Defendants name themselves, Mr. *Robert Adams*, of 76, *King William Street, City*, gunmaker, and Mr. *Charles William Lancaster*, of 157, *New Bond Street*. 6. That the alleged invention was used prior to the date of the letters patent in the following manner—that is to say, that these Defendants have manufactured at their premises in *Gray's Inn Lane* aforesaid, and sold, previous to the date of the letters patent, cartridges for breech-loading firearms formed," &c. &c., "in a precisely similar manner as the process described in the specification, and embodied in the 1st clause thereof."

In the course of the Defendants' case one of their witnesses was asked whether he had not been in *Belgium* in 1861.

Mr. *Rolt*, Q.C., Mr. *Hindmarch*, Q.C., Mr. *Boyle*, and Mr. *Aston*, on behalf of the Plaintiff, objected to this question, as being an attempt to give evidence of anticipation of the patent by prior user, the time and place of which had not been specified in the particulars of objection. The *Patent Law Amendment Act* (15 & 16 Vict. c. 83, s. 41) expressly directs that, in the trial of any action for the infringement of letters patent, "no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent, which shall not be contained in the particulars delivered as aforesaid." The particulars of objection delivered by the Defendants do not state any prior user of the invention in *Belgium*, and must be construed as declaring the particular instances and manner in which prior user is alleged. The object of the statute was to enable the Plaintiff to have time to go and make inquiries, so as to be prepared with his answer to the case set up on the other side; and that object would be wholly frustrated if Defendants are allowed thus to spring

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a mine, and raise a new case, of which Plaintiff has had no intimation whatever: *Curtis* v. *Platt* (1).

Mr. *Daniel*, Q.C., Mr. *Bushby*, and Mr. *Langley*, for the Defendants:—

This evidence did not come to the knowledge of the Defendants until the 4th November, after the cause had come into the paper.

[The VICE-CHANCELLOR:—The right course would have been to have at once applied for leave to amend the particulars of objection.]

The same indulgence ought to be granted as in *Renard* v. *Levinstein* (2), where the Defendant was allowed, during the trial of the case, and after the Plaintiff's case was concluded, to amend his particulars of objection by stating a prior publication of the patent, and to give evidence in support of such new objection. The Court would not exclude this important proof in the Defendants' case on any merely technical ground.

[The VICE-CHANCELLOR:—It will be a very serious inconvenience, and occasion great expense to the Plaintiff, as, if this evidence is admitted, he will have to call witnesses from *Belgium* for the purpose of contradicting it.]

No amount of inconvenience will induce the Court to refuse to do justice between the parties; and if the evidence now sought to be introduced is material, it ought not to be excluded, especially where the Defendants were prevented by mere accident from hearing of it until after the cause had come into the paper. Section 41 of 15 & 16 Vict. c. 83, on which the Plaintiff relied, refers to a trial at law, and not to a hearing of the cause in equity. The Court has ample discretion in the matter; and if the Plaintiff is put to inconvenience, the Court may impose such terms on the Defendants as it thinks proper.

Mr. *Hindmarch*, in reply:—

The Defendants might have given short notice of motion on the 4th November, and ought not to be allowed now at this last hour to put in this evidence. Let them use it on appeal if they are entitled to do so; and between the present hearing and the appeal

(1) 8 L. T. N. S. 657. (2) 13 W. R. 229.

Plaintiff will have an opportunity of making inquiry, and meeting it. If it is admitted at the present stage, the Plaintiff has no means whatever of cross-examining upon it.

SIR W. PAGE WOOD, V.C.:—

At the present moment this evidence ought not to be admitted. The statute is plain to that effect, and the objection to its admission is substantial and not merely technical. The Legislature, being impressed with the extreme hardship of the patentee being suddenly told that what he had done was known, and had been in use before, refused to allow evidence of prior user to be given without stating time and place in the particulars of objection. [His Honour referred to section 41 of 15 & 16 Vict. c. 83.] This was a most seasonable enactment, and intended for the benefit of both parties, Plaintiff and Defendant, that they might be prepared to meet the case, or advised, when they found from the specified particulars of time and place that the objection was insurmountable, to give in and abandon a hopeless contest. Mr. *Daniel* says that the whole question is whether or not truth should be shut out. But even truth, or what is supposed to be such, may be purchased at too great a cost. If this witness could be allowed now, without warning to the Plaintiff, to state what he saw in *Belgium*, some other witness might be brought to say he had bought the invention in *Pekin*, and the case would have to be delayed until counter evidence could be obtained from *China*, during all which time the patent would be running out while the Defendants were under no injunction. I cannot conceive any more beneficial enactment than that contained in section 41 of 15 & 16 Vict. c. 83, which directs that the place and the manner of the alleged prior user must be stated in the particulars of objections on which the Defendant means to rely at the trial; but goes on to provide that although it cannot be done in the course of the trial, it shall be competent for a judge at Chambers to allow the particulars to be amended upon such terms as he shall think fit. In *Renard* v. *Levinstein* I gave the Defendant leave, on payment of the costs occasioned by the application, to amend his particulars of objection, as the lesser of two evils; being of opinion that I might do the Plaintiffs themselves considerable injury if I were to refuse

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the application to amend, and thus occasion the expense and inconvenience of an application for a new trial. All that I can now do is to shut out this evidence, leaving the Defendants to make such application as they may be advised.

No such application was made.

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SPOKES *v.* BANBURY BOARD OF HEALTH.

Injunction—Sequestration—Board of Health.

An injunction was granted on the 6th of March restraining a local board of health from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the Plaintiff, a miller, residing about three miles below the outfall of the works of the local board. Execution of the order was stayed till the 1st of July.

The company did not, subsequently to the 1st of July, stop the flow of sewage into the river, but alleged that they had not yet succeeded in discovering a mode of deodorizing the sewage—that compliance with the order was practically impossible, without stopping the drainage of the town, which would expose them to hostile proceedings at law and equity, and compel them to infringe an Act of Parliament; that there had been no wilful default, and that a sequestration would be ineffectual, as the property of the board was all public property—injurious to the public, as preventing the board from discharging their duties—and futile, as it would compel the members of the board to resign:—

Held, that there had been a gross and wilful contempt, and sequestration ordered to issue.

THE Plaintiff was the occupier of a mill on the *Cherwell*, called *Twyford Mill*, about three miles below the town of *Banbury*.

The Defendants, the *Local Board of Health*, were constituted in 1852, by an Act of the 11 & 12 Vict. c. 63, in which year the provisions of the *Public Health Act* were first applied to the town of *Banbury*. Before 1852, the river *Cherwell* was a clear stream of water, but in the beginning of 1858 the *Board of Health* had completed a regular system of sewers, whereby all the drainage water of the district was made to flow into the river by three large sewers, the outlets of which were about three miles above the mill. During the year 1858, the stream became so foul that the fish

were destroyed; and the water was rendered unfit for all domestic purposes, and injurious to cattle.

Complaints were made from time to time by the father of the Plaintiff, who, up to his death in 1862, resided at the mill; and some steps were taken by the Defendants towards deodorizing the sewage, but without permanent result. Finally, the nuisance increasing during the hot and dry summer of 1864, this bill was filed.

On the 6th March, 1865, his Honour made a decree restraining the Defendants from permitting sewage, or water polluted with sewage, to pass through the drains or channels under their control into the river *Cherwell* in such a manner as to render the waters of the river, at or near the Plaintiff's mill, unfit for use by the Plaintiff, or otherwise injurious to the health of the persons resident at the said mill; and execution of the decree was postponed till the 1st of July, to afford the Defendants an opportunity of removing the nuisance.

Mr. *Rolt*, Q.C., and Mr. *Renshaw*, for the Plaintiff, now moved for a writ of sequestration for breach of the injunction.

The motion was supported by the affidavits of the Plaintiff, who deposed to the river since the 1st of July, 1865, having been (with two or three exceptions when heavy rains had fallen) in a disgusting state, that he had lived all his life at the mill, and had never known the *Cherwell* in such a filthy state as it was in August, September, and October of the year 1865; by a Mr. *Preedy*, who represented that a meeting of the inhabitants of *King's Sutton*, through which the *Cherwell* flows, had been held, at which a resolution was passed complaining to the Board of the inky colour and oppressive odour of the stream, and the injurious effects produced by its foul condition upon men and animals; and by other persons. The fact of the nuisance continuing unabated was, in truth, not denied.

On behalf of the Defendants, an affidavit was made by the clerk to the Board, embodying a report by Mr. *Hawksley*, the engineer, and Dr. *Letheby*, the metropolitan officer of health, which was read, shewing that there were great difficulties in complying with the order. The town of *Banbury* was situate in a hollow valley,

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which had no other outlet than the river *Cherwell;* the Board had purchased several old drains, many of which had existed from time immemorial, and which they could not have stopped without exposing themselves to suits and injunctions. The intercepting of sewage by means of tanks, and cleansing it and purifying it, or carrying it away in cart-loads or waggon-loads upon land, not only required powers of purchasing land, but if it were done the sewage might, from the peculiar nature of the clay soil in the district, be carried back to the river again in its integrity, instead of being purified. It was admitted that if chemicals of a very costly nature were employed during the summer months, the stream might be to some extent purified, and that, owing to the flood of water in the winter months, the same expense would not be necessary all the year round.

Mr. *Giffard,* Q.C., Mr. *E. F. Smith,* Q.C., and Mr. *Dickinson,* for the Defendants.

We have offered that the matter should be referred to Chambers, as was done in the *Leamington Case.* That was, no doubt, before the decree. However, our offer was refused. From the very day when the decree was made we have attempted *bonâ fide* to carry it out, but have found the matter practically impossible. Stopping the sewage would create a nuisance in the town, and the Court will not compel us, at the suit of *A,* to do what would be a nuisance to *B.* There has been no wilful contempt, and without that the Court will not grant what is equivalent to a committal in the case of an individual.

As to sequestration, the Defendants are a public body, having, as such, no private property whatever. They have certain duties cast upon them by Act of Parliament; they have another duty thrown upon them by this Court, that of keeping this river clear from impurities; and those are duties which they will be unable to perform if their property is sequestrated. A sequestration directed against an individual, for example, would only touch the property he held for his own benefit; it would not extend to trust property. All the property held by the Board of Health is held in trust for the performance of public duties.

No doubt we made a mistake in not coming *pro formâ* to

the Court before the time expired, to extend the period for carrying the order into execution. If we had done so, there can be no doubt, on this evidence, that the Court would have granted the application. The Plaintiff no doubt desires some practica remedy, and the question is, what is best to be done? The Board of Health are surveyors of highways in their district, under the 117th section of the *Board of Health Act*, 1848. Now, what would be the effect of issuing a sequestration in this case? The property of the Board is said to consist of a stone-yard, stable, cart-shed, a piece of ground on which sewerage works are erected, and on a portion of which the sweepings and refuse of the town are deposited; of horses, carts, implements for repairing the highways, sewers, drains; books, papers, and muniments of title, and nothing else. To attempt to sequestrate this property, therefore, in the first place, would be of no advantage to the sequestrator, for it is all public property.

Wilful contempt cannot be imagined in this case.

[The VICE-CHANCELLOR:—I am not at all satisfied of that. I do not think it is a compliance with the order to say, "We will do what we can." I am not satisfied that it is not a most wilful contempt.]

Mr. *Giffard*:—I ask whether any persons on earth would take upon themselves what, by the order of the Court, they would personally have to do, namely, to stop the drainage of this town? All I can say is, that I should hesitate to advise them to do anything of the sort.

But we have not here to deal with individuals, only with a corporation. The Board are trustees, with a very delicate trust to perform. The reasonable course is to go into Chambers, when any suggestion that is made will be put into practice if possible; but to issue the writ would be useless, inasmuch as it would result in nothing but the resignation of every member of the Board.

The Court will not enforce an order to the injury of third parties. In the *Birmingham* case, *The Attorney-General* v. *The Council of the Borough of Birmingham* (1), it was the persons themselves against whom the order was made who were liable to be injured by

(1) 4 K. & J. 528.

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its being enforced. They had no right to complain; but here strangers will be injured, and the Court will consider their interests.

The result of granting this motion will be, in order to enforce compliance with the injunction, to take away the means of complying, and with it to compel the Defendants to disobey an Act of Parliament.

The VICE-CHANCELLOR said that, undoubtedly, there had been a gross breach of the order, and the only question was, what was the best practical mode of enforcing it.

Mr. *Rolt*, in reply:—The only practical mode is sequestration. It has been argued on the other side that a writ of sequestration as against a public body is mere waste paper.

[The VICE-CHANCELLOR:—The question is, upon what property would the sequestration operate?]

It is irrelevant at this stage to enter into evidence as to the property to which the writ would apply. We know that we can put it in force. The practice of the Court is not to issue sequestration against property specifically described, but against any property which there may be.

In this case an order has been made against these ~~Plaintiffs~~ Defendants. Instead of obeying it, they say, "Tell us how we are to obey it." That is not the Plaintiff's business; if there is nothing else for it, but for the Defendants to build up their drains, they must do so, rather than disobey the order of the Court; and the people of *Banbury* must pay additional rates, and dispose of their sewage in some other way. It is a question of saving the pockets of the people of *Banbury* at the expense of the Plaintiff. He referred to *The Attorney-General* v. *The Great Northern Railway Company* (1), and *The Great Northern Railway Company* v. *The Manchester Railway Company* (2).

SIR W. PAGE WOOD, V.C.:—

I think that in this case the Defendants have been labouring under a mistake, and, as it appears to me, a very gross mistake,

(1) 4 De G. & S. 75. (2) Seton on Dec. 946.

which I attempted to dissipate in the case of the *Birmingham Local Board of Health*, to which reference has already been made. I have not found that any Court has at present dissented from the conclusion at which I arrived in that case. Certainly the order, as made, was obeyed, and obeyed without appeal. There I was told that the large and important town of *Birmingham* would be stifled and smothered, and perhaps subjected to pestilence, if the Board were not allowed to discharge the whole of their sewage into the river, in which a private gentleman, the Plaintiff, had certain rights of fishing, as well as of sending his cows to drink, and other benefits of that kind. But it appeared to me quite plain from the Act of Parliament that they had no right to discharge their sewage into the river; and I did not in the least regard the circumstance of their acting for 100,000 people any more than I should have regarded the circumstance of their acting for one. I think the principle of law must be so. What difference can it possibly make as to the commission of an illegal act, whether a man acts on behalf of thousands or on behalf of himself only? The act is illegal, and being illegal, the party injured has a right to be protected. It does not signify whether the injury is inflicted by many or by one.

Now, as regards the question of wilful breach of this injunction, Mr. *Smith* said, and Mr. *Giffard* followed him, that, if this were the case of an individual, the Court would not act, unless it was convinced that there had been a wilful breach of the injunction, and that the Court would not in such a case commit the individual. I answer, without doubt, that if this had been the case of an individual, I should have considered what has been done as a breach of the injunction, and should have committed that individual.

Assuming it to be the case of an individual, the matter will not bear argument for a moment; and I am very glad that that illustration was put, because it will corroborate the opinion I have very strongly entertained and acted upon, and shall continue to act upon, unless corrected by a higher tribunal—namely, that the rights of those who are injured cannot depend upon the question of whether it be one or many who inflict the injury. First,

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take the case of an individual: see how it would stand, and whether there would not be a deliberate breach of the injunction. Suppose a man (as it must be supposed in this case), for his own convenience, for the purpose of getting rid of his own sewage, something that annoys him, throws it into his neighbour's yard, or into his neighbour's river, and that he is ordered by the Court not to permit the sewage under his control to pass into his neighbour's river, to his annoyance. Suppose that he afterwards comes here, telling the Court that he has consulted most eminent chemical authorities, and has done the best he can during a long continuance of inquiry, but that he has found out there is no possible mode by which he can deodorize the sewage, or at least that he has not yet arrived at or discovered it, and therefore that he has not ceased to pour that sewage into the river or upon his neighbour's property; that he pours it into the river because he does not find it pleasant or agreeable to retain it; that he means to continue to pour it into the river until he shall find out something that will deodorize it; and then asks the Court to stay its proceedings until that is done. Would not that be a most outrageous breach of the order, and a flagrant contempt, for which the only proceeding the Court could take would be to order committal? Morally speaking, I can see a wide difference between that case and the conduct of these gentlemen. I do not suppose they had any (I certainly hope they had not any) intention of committing a wilful breach of the order of the Court; although I was not a little surprised to hear an eminent counsel tell me, not precisely that he would advise his clients to commit a wilful breach, but that he would not advise them to do what was necessary to comply with the order of the Court. I confess I was surprised to hear that, and I think it due to the dignity of the Court, to say, that that is not the view which the Court can take of any of its orders; but that the simple and only view is, that an order must be obeyed, and that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter; and any one who does not obey it to the letter is guilty of committing a wilful breach of it, unless there be some misapprehension which all mankind are subject to, and which may mislead

him upon the plain reading of the order. But, in this case, that the order is plain there is no doubt. It is plain and distinct that the Defendants shall not, after a given day, permit any sewage to pass through the drains or channels under their control, into the waters of the *Cherwell*, in a manner to make it unfit for the use of the Plaintiff. That is language which no one can misunderstand. Having that order before them, their simple course was to say, "After the 1st of July, come what may, we must not allow the sewage to pass into the river *Cherwell*." It was not for them to say, let the Court or the Plaintiff point out what is to be done, or how we are to deodorize it. The Plaintiff does not care in the least whether they find out a way to deodorize it or not. The Plaintiff only says he has an order of the Court which forbids them from sending down filthy sewage to him; it is their duty not to send it; he has nothing else to do with it; he is content to rest on the order of the Court, and it is for them to shew the Court that they have obeyed it. These gentlemen were given from the month of March to the 1st of July to comply with the order. The order was made in the month of March, but, as has been done in several cases, knowing that it requires time for matters of this kind to be carried into effect, the Court said they should not be bound to comply with the order until the 1st of July. But the order is made peremptory from the 1st of July.

Now, this is a decree of the Court, and it is not under my control. I cannot alter it, although it is my own decree; it is beyond me. There it stands, and I have only to see that it is obeyed. If these gentlemen had come before the 1st of July with a motion to ask for a longer time to comply with the order of the Court, it would have been a question, even then, whether the Court would have had power to enlarge the time mentioned in its own decree; because it is not an interlocutory order. But, at all events, that might have been discussed. Instead of which, they quietly let the 1st of July pass by, writing a number of letters, in which they say they are very uneasy because the 1st of July is so near; but it never seems to have occurred to their minds, that there was an order of the Court which was not satisfied by their being uneasy because the time was so near at hand. I can only say that that

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does not satisfy the order, but that the order required obedience, and at least required that an application should have been made to the Court that they might have some further time if it should appear that such an order could be made, although I cannot say, that as at present advised, I should have made the order.

My conviction is, that there are no means of effectually dealing with the sewage, and I am satisfied of that by their own evidence. Dr. *Letheby* says in one of his letters (I do not read it through, because it is in my remembrance, and, I dare say, in the recollection of counsel), "I think it may go on in such a state during the winter months as, possibly, to require very little to be done, because there will be a copious supply of water; and when the supply of water is copious, which may or may not be the case, although we happen to have a great deal of wet weather up to the present moment, there will not be such a grievance."

But on the 7th of October last (long after the 1st of July, and after the dry weather), one of their own witnesses, Mr. *Beasley*, who was sent down to inquire into it, said, "You have made everything very comfortable for the town," and that is what the town cares for. "There is hardly any smell outside the walls, but I am sorry I cannot say the same as to the river." That is long after the time at which the Board ought to have ceased pouring their sewage into the river, and this gentleman says: "I am sorry to say, I must make an indifferent report as to the river."

Then, in another letter, Dr. *Letheby* writes: "During the present supply of fresh water, there is no such great evil;" but in a former letter he says: "I think you will get rid of such and such inconveniences if you will follow out what I recommend as to my course of deodorizing;" and he adds: "I am afraid you will not get rid of" what he calls "the second fermentation." He does not see how it is to be done. Whereupon some other schemes, like the *Croydon* scheme, are thought of, and both Dr. *Letheby* and Mr. *Hawkesley* say: "That will not do; you cannot try the *Croydon* scheme, because it is clay land; and even if you bought a large property, you would not be able to get enough to absorb the impurities, because the soil is clayey and will not absorb the impurities." Dr. *Letheby* also says: (which I am very sorry to

hear) "that even the *Croydon* scheme has not turned out so successful as it was supposed it would."

It is, therefore, quite clear and plain that this gentleman cannot be protected except by simply stopping the sewage, and I apprehend that that is the course which the Defendants ought to have taken. They created the evil. It did not exist until they made their works. That question was tried at the hearing, and I cannot now re-hear the cause. Although there were other works, and other drains that went from the town of *Banbury*, they did not create the evil. What created the evil was what was done by those gentlemen, and those who created the evil must remove it. It is not for me to say how they are to do this. But what they have done they must undo. They must take their own steps; but it is only right they should know that there is really no distinction whatever made by this Court between the case of an individual (and, as I said before, I am glad the illustration was put), who finds it convenient, for his own accommodation, to turn his own filth into his neighbour's yard or river, and the case of an aggregation of individuals like the town of *Banbury*, who find it convenient for their own accommodation to turn their sewage into this gentleman's mill-pond. They have no right to do it, and it appears to me quite plain, that there has been a breach of the injunction.

The only doubt I had was as to the sequestration, whether it would be effective. But I see a certain class of property—I do not wish to specify it—on which I think it could operate, and, therefore, I shall grant the sequestration; and the costs of this motion must, of course, be paid by the Defendants.

Dec. 15th. On this day the Defendants moved before the Lords Justices to discharge the order of the Vice-Chancellor. Their Lordships, without hearing the respondent, refused the application with costs. See 11 Jur. N. S. 1016: 14 W. R. 188

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HINDLEY *v.* EMERY.

Injunction—Damages—Cairns' Act (20 & 21 *Vict. c.* 27).

If an injunction can be supported to restrain the progress of dilapidations not completed at the date of the filing of the bill, then Sir *Hugh Cairns'* Act (20 & 21 Vict. c. 27) gives jurisdiction to assess damages in respect of such parts of the dilapidations as have been already effected at that date.

THIS suit came on upon motion for decree. The bill was by a mesne lessor against his lessee to restrain the pulling down of certain houses upon the demised lands.

The Plaintiff, *Hindley*, was lessee of certain hereditaments, in *Gray's Inn Lane*, for a term expiring at Christmas, 1880, and of other hereditaments at *Fox Court*, adjoining *Gray's Inn Lane*, for a term expiring at Midsummer, 1886; and by a lease dated the 12th of August, 1858, the Plaintiff demised to the Defendant all the hereditaments in *Gray's Inn Lane* for twenty-one years and one quarter, less seven days, from the 25th of March preceding, and those in *Fox Court* for twenty-nine years and three quarters, less seven days, from the same 25th of March, at the rents therein mentioned. The lease contained the usual covenants to repair and keep in tenantable repair the demised premises during the terms, and covenants, not during the term to cut, or injure, or pull down the principal timbers or walls, and not to carry on certain trades.

The Defendant entered under the lease and continued tenant, and in July, 1864, applied to the Plaintiff for leave to make alterations, by throwing down six out of eight cottages, and the back wall of, and a party wall between, the two remaining cottages, and by building workshops on the site of those thrown down, and altering the two remaining cottages into workshops. Negociations proceeded for some time, and there was a conflict of evidence as to whether the Plaintiff gave such leave or not, which issue was determined by the Vice-Chancellor in the Plaintiff's favour.

There was also much conflict as to whether the property was not in fact improved by the alterations. The freeholder's consent to the alterations had been purchased by the Defendant.

The bill was filed on the 17th of February, 1865, and prayed that the Defendant might be restrained from pulling down or altering, from continuing to alter or pull down, and from allowing to remain altered or pulled down, any of the dwelling-houses or buildings comprised in the lease, and from allowing the same premises, or any part thereof, to remain in any other plight or condition than that in which they were in the month of June, 1864, and before the alterations. A prayer for damages followed.

At the date of the filing of the bill the six cottages had already been pulled down, but neither the back wall nor the party wall of the two remaining cottages had yet been demolished. The Plaintiff having obtained an interim order, was about to move before vacation; but, on the Defendant's affidavit, suggesting that he did not intend to proceed with the further demolition, the motion stood over by consent till the hearing, without prejudice. It appeared, however, that the party wall had since been thrown down.

Mr. *Giffard*, Q.C., and Mr. *A. Thompson*, for the Plaintiff.

Mr. *Amphlett*, Q.C., and Mr. *Berkeley*, for the Defendant, discussed the points of fact disputed, and in addition urged that as the mischief had already been done at the filing of the bill, no case could be maintained for an injunction; that the only remedy lay at law for damages; and that, as this Court would not formerly have had jurisdiction for the purpose of injunction, it had no jurisdiction to grant damages under the statute 20 & 21 Vict. c. 27. They cited *Isenberg* v. *The East India House Estate Company* (1). *Lawrence* v. *Austen* (2).

Mr. *Giffard*, in reply, remarked that, though much of the demolition had been completed, it was not all completed at the filing of the bill, as the back wall and the party wall of the two cottages were standing at that time; and argued that, as the Court had in that respect jurisdiction, it had also jurisdiction to grant damages for the injuries already done. It could also order restoration of the parts pulled down since the filing of the bill.

(1) 33 L. J. Ch. 392; 12 W. R. 450. 10 Jur. N.S. 221.
(2) 11 Jur. N. S. 576; 12 W. R. 981.

V.-C. W. 1865 HINDLEY v. EMERY.

Sir W. Page Wood, V.C., after commenting at some length on the evidence, and deciding the issues of fact in the Plaintiff's favour, proceeded:—

It may be conceded that if all the mischief had already been completed before the filing of the bill, this Court would not have had jurisdiction to entertain the suit for injunction; and if that were so, could not grant damages for the mischief done; but it appears that in this case there was yet room for its intervention by way of injunction to protect from further injury the buildings still standing at the date of the filing of the bill, and to restrain the further breach of the Defendant's express covenant not to injure or pull down the principal timbers or walls thereof. That being so, on the principle I have already to some extent acted on in the case of *Middleton* v. *Magnay* (1), I think the Court has jurisdiction to assess damages for the breach of covenant already committed. The intention of the Act, 20 & 21 Vict. c. 27, was to give the Court power to grant complete relief wherever it had a well-founded jurisdiction to entertain the case, and not to compel a Plaintiff to seek partial relief in one Court, and then turn him over to another in order to obtain supplemental relief. I shall, therefore, grant the Plaintiff the injunction asked for as to the buildings still standing on the 17th of February, 1865, and direct the restoration of those demolished since the filing of the bill; and shall direct an inquiry as to the damages caused by the Defendant's breach of his covenant to repair and keep in repair the other demised premises, and not to cut, injure, or pull down, the principal timbers and walls.

On the application of the Defendant, it was directed that the order to restore the cottages remaining unaltered at the date of the filing of the bill should be subject to an inquiry as to whether it would be more to the Plaintiff's benefit that damages should be assessed in lieu of such restoration; and in such case it was ordered that the damages should be assessed, such inquiry to be at the cost of the Defendant.

(1) 1 H. & M. 233.

MANCHESTER SCHOOL CASE.

V.-C. W.
1865
Nov. 11.

Charity—Grammar School—Scheme—Free School—Gratuitous Education.

Upon evidence of the decrease in value, during the last thirty years, of the property of the Free Grammar School, founded at *Manchester* in the reign of *Henry* VIII., and of the impossibility, for want of funds, of fully carrying out the extended system of gratuitous education, including instruction in modern languages and the physical sciences, which was sanctioned by a scheme settled in 1849, the Court, having regard to the manifest intention of the founder, not to make it a school for the poor only, but to establish a liberal system of education, so as to fit boys for the university, allowed the admission of boys, beyond the existing number of free scholars, on payment of capitation fees, which should be applied in increasing the educational funds, and not paid to the masters directly.

To obviate any invidious separation of the boys into two classes of rich, or paying, and poor, or non-paying, the Court at the same time directed that, for the future, admission to a gratuitous education upon the foundation should depend upon proficiency in examination, without reference to the means of the parents.

THIS case came before the Court upon a summons adjourned from Chambers, for the purpose of taking into consideration a proposal by the trustees of the school that the revenues of the charity applicable for educational purposes should be augmented by the admission of boys into the school whose parents were willing to pay a capitation fee.

The *Manchester Free Grammar School* was founded in the reign of *Henry VIII.*, by *Hugh Oldham*, Bishop of *Exeter*, and endowed with property then stated to be of the yearly value of £40, including the corn-mills of the town. By the principal foundation deed, which bore date the 1st of April, 1525, after reciting the view of the founder, "that the bringing-up of children in good learning and manners was the chief cause to advance knowledge, and that the liberal science or art of grammar was the ground and fountain of all the other liberal arts and sciences," and that he had at his great costs and charges within the town built a house adjoining to the College of *Manchester*, for a Free School, there to be kept for evermore, and to be called "*Manchester School*;" which house, together with other premises purchased by

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him, he had conveyed to *Hugh Bexwycke* and *Joan Bexwycke* and their heirs to be disposed and converted to and for the continuance of the teaching and learning to be had and taught in the same school: it was witnessed that the said *Hugh* and *Joan* gave and granted the said premises, together with others of which they were seized to their own use to twelve persons therein named, and their heirs for ever, to the use and intent that they should perform, fulfil, and observe all the acts and ordinances, provisions and constitutions contained in the schedule thereto annexed. The schedule provided for the appointment of a high master and usher, "having sufficient literature and learning, and able to teach children grammar after the school use, form and manner of the School of *Banbury*, which is called *Stanbridge Grammar*, or after such school-use manner as in time to come shall be ordained universally throughout all the province of *Canterbury*," and directed that they should "teach freely and indifferently every child and scholar coming to the same school without any money or other rewards taken therefor," except only their stipends, which were to be £10 a year for the high master, and £5 a year for the usher. No scholar or infant "of what country or shire soever he be, being man child," was to be refused admission to the school, "except he have some horrible or contagious infirmity infective" to be judged of by the warden of *Manchester College* for the time being.

The schedule, which contained various minute provisions for the regulation and discipline of the school, and the application of the surplus revenue to the "exhibition of scholars yearly at *Oxford* and *Cambridge* who had been taught in the school," &c., did not overlook the possible necessity of reform, and in the concluding clause, after stating that "because in time to come many things may and shall survive and grow by sundry occasions and causes which at the making of these acts and ordinances was not possible to come to mind," the feoffees were authorized "from time to time, when need should require, calling to themselves discreet learned counsel and men of good literature, to augment, increase, expound, and reform all the said acts, ordinances, &c., only concerning the schoolmaster, usher, and the scholars for their and every of their offices concerning the said free school for ever."

The charity estates having greatly improved in value, additions were from time to time made to the salaries of the masters. Assistant masters were also appointed, and twelve exhibitions of £60 each were appointed. In 1833 the net annual income of the charity, which was principally derived from the monopoly of grinding malt for *Manchester* at the school mills, had increased from £40, the amount in 1525, to £4000, and the surplus income had been accumulated to a large amount. At this time there were 198 scholars in the school, of whom thirty-nine were boarders in the masters' houses. New school-buildings were erected at a cost of £10,000, but in the meantime the income derived from the mills had continually declined, until the profits from this source, which reached £2500 in 1833, came to only £749 in 1848, and had since fallen to £372. In 1849, after a long litigation, which is reported as the *Attorney-General* v. *the Earl of Stamford* (1), a new scheme was ordered by the Court of Chancery, which, among other things, prohibited the masters from taking boarders, and directed a course of instruction, gratuitous in all cases, in mathematics, general English literature, modern languages, arts and sciences, and generally in an extended system of education, in accordance with the requirements of the time.

It was also provided by the scheme that all boys of the age of five years should be eligible to become scholars of the school, and should be allowed to remain up to twenty years old; that a library should be provided and an annual sum of £50 appropriated for the purchase of books; that there should be an annual examination by resident graduates of *Oxford* and *Cambridge*, premiums not exceeding £25 a-year awarded, and exhibitions at the universities granted to scholars quitting the school, and found duly qualified by the examiners; the number and value of the exhibitions being made dependent on the amount of the surplus funds remaining at the disposal of the feoffees and trustees. An annual sum of £50 was also directed to be applied in the purchase of Greek and Latin lexicons and classical books to be supplied at half the cost price to boys of talent and industry, who might be unable through poverty to buy the necessary classical books.

At the present time there were about 250 boys in the school, all

(1) 1 Ph. 737; also 16 Sim. 453.

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taught gratuitously, and there was room in the building for about 100 more. The net income of the charity had, however, fallen to £2500, so that the means at the disposal of the masters were stated to be wholly insufficient to give effect to the enlarged course of education directed by the scheme of 1849. So far, too, from there being any prospect of an increased revenue, the profits of the mills had dwindled down to £372, and no less than eight breweries in *Manchester* had been closed within the last eighteen months in order to be established beyond the city limits, and thus escape the tax for grinding malt payable to the school mills by all breweries within the city.

Under these circumstances the trustees now sought to obtain the sanction of the Court to a variation of the scheme of 1849, so as to enable them to admit into the school, in addition to the present number of 250 free scholars, boys on payment of a capitation fee of £12 12*s.*; it being intended that the moneys to be derived from this source should be handed over to the common funds of the charity, and applied for the purposes of the school. The application was supported by evidence as to the declining state of the school property, as to the anxiety of a large number of persons in *Manchester* to obtain the advantages of the school for their children, and their willingness to pay a capitation fee; and as to the impossibility without some extraneous assistance, not only of admitting additional scholars, but also of carrying out the course of education for those already in the schools directed by the scheme of 1849, and especially in German, the physical sciences, and chemistry.

Professor *Rogers* and Mr. *Reynolds*, the examiners of the school, from *Oxford*, expressed themselves strongly in favour of the alteration in the scheme proposed by the Petitioners, which was also assented to by the Dean of *Manchester*, the President of *Corpus Christi* College, *Oxford*, and the masters of the school; and in addition to this assent, a resolution in favour of the proposal had been carried by a large majority at a public meeting held in *Manchester* in February last.

Several of the inhabitants were opposed, however, to the proposal of the trustees, and insisted that the education ought to remain, as it ever had been, perfectly gratuitous. Evidence was also

adduced in opposition to the Petition, for the purpose of showing that there was a fair prospect of a great increase in the value of the school property under judicious management, from the proximity of certain new railway works and approaches now in progress, and by granting building leases over portions of the property.

Mr. *Rolt*, Q.C., and Mr. *Little*, appeared in support of the Petition, and contended that, looking at the scope and object of the scheme sanctioned in 1849, and the extremely liberal system of education directed by the founder (to which Lord *Cottenham* adverted in his judgment in *The Attorney-General* v. *Earl of Stamford* (1), the Court had ample jurisdiction to accede to the proposal of the trustees, supported as it was by such a weight of recommendation. It was not intended to divert any portion of the existing funds from the purpose of gratuitously educating the free or foundation scholars. All that was sought was to make that education more complete and more in accordance with the scheme of 1849, and at the same time to extend the benefits of the charity to the town at large, by admitting a large number of boys who were anxious to be educated at the school, and willing to pay for such education, but could not now be admitted owing to the insufficiency of the school funds. The Court would not assume that any undue preference would be shown to the boys who paid, especially as the capitation fees, if sanctioned, would go, not to the masters, but to the common fund.

Mr. *Wickens*, for the *Attorney-General*, opposed, and contended that the Petitioners had failed to make out any sufficient case to induce the Court to depart from the scheme of 1849, which, in accordance with the views of the founder, expressly provided that all instruction given in the school should be gratuitous. Was it desirable that, in a large city like *Manchester*, the boys educated in the same school should be divided into two distinct classes of rich and poor? What test was to be adopted for selecting those boys whose education was to be gratuitous? If poverty was made the test, then the qualification could only be ascertained by a most offensive and inquisitorial process of inquiry, which would occasion immense mischief and heart-burning throughout the place.

(1) 1 Ph. p. 746.

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The VICE-CHANCELLOR intimated that he saw no special intention in the foundation deed of benefiting the poor exclusively, and that an examination test might very well be adopted for the admission of boys upon the foundation.

Mr. *Wickens* submitted that an admission by examination would virtually exclude the children of poor parents. Those boys who had the greatest home advantages, and had had the largest expense bestowed upon their education, would naturally succeed best in the examinations, and monopolize the benefits of the charity. Then, as to the effect upon the boys themselves, the introduction of class distinctions, could not fail to work most injuriously, as was pointed out by the Master of the Rolls in the *Bristol Grammar School Case* (1). In the case of *Eton* and *Winchester* and the other ancient public foundations, the evil was not seriously felt, as these schools enjoyed a normal high tone, and the boys, collegers and commoners, were recruited from the same class, and had received the same early associations for the most part. The deficiency of funds might be remedied by a better system of management, or the expenditure on education might be reduced by omitting some of the things specified in the scheme of 1849, such as German, chemistry, &c., which were mere educational luxuries. At all events, the Court would hesitate before altering the deliberate and well-considered scheme of 1849, unless compelled by absolute necessity. No such absolute necessity was shown to exist, and the difficulties, whatever they might be, could be met in other ways than by the course proposed by the Petitioners, the positive disadvantages of which far outweighed any possible benefits to be derived from it.

SIR W. PAGE WOOD, V.C. :—

I think the scheme suggested of introducing a class of scholars on payment ought to be sanctioned by the Court. The scheme originally suggested to the Court, in 1833, was a scheme for dealing with the funds which had at that time increased to a net income of nearly £4000, so as to enlarge the benefit to be derived from the charity. That being so, the only question

(1) 28 Beav. 161 (see pp. 168, &c.).

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that arose during all the discussion, which seems to have lasted from 1833 to 1849, was, what was best to be done with reference to the means so improved; and whether or not, regard being had to the substitution suggested for the narrow construction given by the Court to the words "grammar school," and to the direction specially contained in the founder's own deed, that the surplus funds should be applied towards exhibitions at the universities, there could be that enlarged system of education by the introduction of modern languages and other subjects, beyond those to which the word "grammar" had been originally confined, which was so eminently necessary in a city such as *Manchester*. A difficulty was supposed to exist with respect to the school, from its having been excepted from 3 & 4 Vict. cap. 77, which authorizes and superadds other branches of instruction to those included by the Court of Chancery in the word "grammar;" and it was then pressed in argument that it would be impossible for the Court to introduce any scheme other than that of a strict grammar school. Lord *Cottenham*, however, disposed of that argument by referring to the special clause in the founder's deed, authorizing the feoffees to introduce such changes as they thought might be requisite from time to time as regards the masters or scholars.

It is true that a good deal of that declension of income which is now so much deplored had taken place in 1849, when the scheme came to be settled; and it would seem that if it had been brought to the attention of the Court, so extensive a scheme as that which was adopted would hardly have been sanctioned, especially as the privilege of taking boarders was then taken away from the masters, thus rendering necessary for their support some substituted provision out of the funds of the school. But whether that was considered in 1849 or not, the income of the charity is now utterly insufficient for carrying into effect a very large portion of the scheme then settled which is much larger and wider than anything which the funds can allow.

The case stands very much in this position. Having come before the Court in 1849, with resources which appeared to be sufficient, as the Court thought, for all the purposes which were then sanctioned, the trustees now tell me that without additional support the scheme then decreed cannot be carried into effect. They do not

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repeat any attempt to introduce boarders in contravention of the express prohibition of the Court in 1849, but submit another method which is free from many of the objections attaching to boarders. Although there is space for 350 boys, the trustees state that they cannot take such a number without rendering the school inefficient; because they have not a sufficient staff of teachers; and further than this, that although the funds of the charity have been wholly exhausted in providing for the education of the 250 boys (to which the number is now limited), there still remain branches of instruction, such as German, chemistry, and the physical sciences, considered by the Court to be desirable and of considerable importance for boys in a city like *Manchester*, but which cannot be carried out for want of funds, unless some extraneous support is afforded. On the other hand, there are a number of boys in the place whose parents desire that they should enter the school even on payment of a considerable capitation fee.

Looking at the evidence as to the decline in the value of the property, and the slender chance of any improvement, having regard to the principal source from which it is derived—a monopoly of grinding malt at the school mills, which is a privilege naturally considered extremely offensive at the present day—it is impossible to hold that I ought not to accede to the wishes of those in the town who are pressing to obtain the benefits of the school for their children, and are willing to pay for them, thus contributing a sum which will not only educate their children without any expense to the charity, but will also leave a surplus so as to enable the trustees to give a better education to those free boys who are to be admitted on the original foundation. Surely that is a great benefit, unless it be counterbalanced by some overpowering disadvantage on the other side. Now the disadvantages which exist as to boarders one can quite understand, especially in large towns. Those objections have been fully stated by the present Master of the Rolls in the case of the *Bristol* School, and my attention was called to them in the *Berkhampstead School Case*. It was said that greater attention would be paid by the masters to boys boarding in their houses, that they would be better educated, and would carry off all the prizes and exhibitions, intended to be shared by all, by the scheme of 1849; and,

further than this, that there would be that separation into classes of rich and poor in this large town, which has been thought so undesirable. But these objections do not apply to the present proposal. In admitting a class of boys on payment of capitation fees, there will be no ground for favouritism towards these particular boys, as the masters can have no interest in one boy more than another; the fees being paid, not to the masters, but into a common fund, to be applied for the common interests of the school. If the effect would be to constitute two distinctly marked classes—one of rich boys who paid, the other of poor who did not pay—then there would be great force in what has been urged by Mr. *Wickens*, who kept clear, however, of saying that it was the intention of the founder to make it a school for the poor only. In fact, the founder does not seem to have had any intention of benefiting poor children only, as appears from the ordinance against scholars bringing into the school "any dagger, hanger, or other weapon invasive," and the appointment of "two poor children" to perform certain menial offices, such as sweeping and taking care of the school. Without carrying the view of the founder quite so far as it has been carried by Mr. *Little*, that the scheme of the founder extended to all matters taught at the university, it is evident that the founder's intention was to establish a liberal system of education which should fit the scholars for the university. It must be remembered that at that period they went to the universities at fifteen years of age, and, therefore, the instruction then given cannot be compared with the instruction now given to persons sent up to college. But with that exception the founder intended to establish a large scheme of education. He made that wise provision for altering the scheme of education, clearly involving what was to be done with respect to the scholars, but not saying one word about any distinction between rich and poor. Having exhausted the funds of the charity by teaching gratuitously, in a much more large and extended form than was originally comprised in the term "grammar," and enlarging the system of education in accordance with the wishes of the founder and the provisions adopted by the scheme of 1849, the trustees come to the Court to obtain sanction to their proposal, which will improve the condition and instruction of the boys

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already in the school, and, at the same time, give an immense advantage to the town, by admitting a large number of boys who are seeking admission and cannot be now admitted from want of funds. There need be no separation into rich and poor, as children can be admitted in some manner that will render such a distinction impossible. The mode to be adopted must, perhaps, be a little more fully considered at Chambers, but it certainly need not be founded upon the means of their parents. They will be admitted to the school, and the whole of the scholars will form one body; those who are obtaining gratuitous education being helped by those who are not; those who are paying for their education being placed in no invidious position of being distinguished from the poor scholars; while the foundation scholars will not be subjected to any such invidious objections as might arise if they were admitted solely in respect of their poverty. Some scheme of examination should be provided, but it is a question which requires a good deal of thought, as it has not arisen before. Some provision is also necessary as to age, as it will not do to put boys of sixteen into competition with boys of five for admission into the school. I am wholly favourable to the scheme of examination without the least inquiry whether the boy be rich or poor. I shall leave that to the conscience of the parent—whether he chooses to send his boy on the foundation or not. I may add that I should have taken more time to consider the matter if the proposal had not come before me recommended by a weight of authority which shows that it will work well. Giving every possible weight to the very respectable memorial signed by a large body of persons opposed to the proposal, the balance in favour of the proposal very much preponderates. The matter will be remitted to Chambers with the following declaration:—The Court approves the admission of scholars beyond the 250 free scholars, on payment of a capitation fee to be fixed by the trustees, not exceeding £12 12*s.* for each boy. A clause to be inserted in the scheme at Chambers providing for the admission of free scholars by examination, and also a clause to be inserted in the scheme leaving it open to an application to the Judge at Chambers as to the number of free scholars in the event of an augmentation or further diminution of the funds of the charity.

V.-C. W.
1865
Nov. 15.

SMITH *v.* BARNES.

Production—Documents—Title Deeds.

Mortgagee taking conveyance of equity of redemption from trustee thereof, with notice of the trust, cannot withhold production of such conveyance in a suit, by *cestui que trust*, for redemption of the mortgage and reconveyance of the property, though one of the trusts was a trust for sale.

THIS case came on upon an adjourned summons for production of documents.

Morris Griffith was entitled to certain freehold property which he mortgaged to the Defendant *Barnes*, to secure a sum of £200, and died devising the property to his widow *Mary Griffith*, and one *Hardee*, as trustees upon trust for the maintenance of his widow and children, until the youngest child should attain the age of sixteen years, and then upon trust, in the events which happened, to sell and divide the purchase moneys, one-third to *Mary Griffith*, and the residue among his children in equal shares. The trust for sale became operative about the end of the year 1848. *Hardee* went to *America* in 1851, and died there in June, 1852.

In the year 1860, *Mary Griffith* died intestate. She had no personal representative. *Barnes* entered into possession as mortgagee. This bill was filed by some of the children, and charged that *Barnes* was overpaid by the rents and profits, that some of the testator's children refused to join, and prayed redemption and an account as against mortagee in possession, and reconveyance on payment by the Plaintiffs of what, if anything, should be found due. It also prayed repayment by *Barnes* of the amount, if any, overpaid to him by receipt of rents and profits.

The answer, admitting the will and the death of *Hardee*, averred that *Morris Griffith* died insolvent as to his personal estate, and that *Mary Griffith* was obliged to borrow money to pay his debts and funeral and testamentary expenses, and to carry on his business, which was that of a maltster, for the maintenance of herself and children, and that she borrowed for these purposes £100 of *Barnes*, and subsequently became indebted in two other sums of £50 each

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to other persons for the like purposes, for which sums *Barnes* became her surety, and as such, was called on and obliged to pay them, and that no interest was paid to him after the year 1850. That in 1851 he was about to take proceedings for foreclosing, when *Mary Griffith* signed a written authority to sell the lands in question by auction, and that they were offered for sale in January, 1852; but no bidder could be found for more than £310, and they were not then sold. That shortly afterwards, she contracted for the sale of them to another person at £320, but the contract was rescinded; that she thereupon, in the month of February, 1852, entered into a contract with *Barnes*, for the sale to him of the property free from the equity of redemption, for £355, which was more than the value of it, and agreed that he should retain the money in discharge of the principal and interest then due to him, and that accordingly a deed dated the 10th of February, 1852, was executed between *Mary Griffith* and *Barnes*, reciting the mortgage and the putting up for sale of the property, and the offer of £310, and the contract "for the absolute purchase of the premises, and of the right and equity of redemption of her the said *Mary Griffith*, therein as devised under the will of *Morris Griffith*, for the sum of £355," and witnessing, that in consideration of the sum of £355 so due to *Barnes* as aforesaid, in full, for the absolute purchase of the said hereditaments, and of all the equity and right of redemption therein, *Mary Griffith* released, &c., the proviso for redemption and all the estate, &c., both at law and in equity of the said *Mary Griffith*, to the end that *Barnes* should thenceforth for ever peaceably hold the premises to the use of him, his heirs and assigns, free from any equity of redemption. The answer also averred knowledge and acquiescence by the *cestuis que trust* in the arrangement.

This deed, and the agreement leading to it, the Defendant *Barnes* was required to produce, and he claimed privilege as to them, averring that they related exclusively to, and constituted the muniments of, his title. The other title deeds, including the mortgage deed, were also required, and the like privilege claimed; but the claim for their production was not pressed, and the argument was confined to the two documents above specifically mentioned. The affidavit of the Defendant claiming privilege did

not aver that the documents in question disclosed nothing impeaching the defence raised by *Barnes* to the bill.

Mr. *Chapman Barber*, for the Plaintiff, argued that production should be ordered; first, because the estate was a trust estate, and the Defendant having taken it from a trustee with notice of the trusts, was bound to discharge himself of the liability to those trusts, and was, therefore, bound to produce the deed on the application of the *cestuis que trust*. He cited *Latimer* v. *Neate* (1), *Adams* v. *Fisher* (2), *Hardman* v. *Ellames* (3), *Hunt* v. *Elmes* (4), *Neesom* v. *Clarkson* (5). He also relied on the omission of the affidavit to aver that the documents did not negative the defence set up by *Barnes*, and cited *Combe* v. *The Corporation of London* (6).

Mr. *W. Pearson*, for Defendant *Barnes*, argued that this was the simple case of a mortgagee who had purchased the equity of redemption, as to whose right to refuse production of his title deeds the cases were clear; *Greenwood* v. *Rothwell* (7), *Dendy* v. *Cross* (8), *Howard* v. *Robinson* (9). The fact that the vendor was a trustee, was in this case immaterial, as it was clear on the face of the bill that the trustee was directed by her trust to sell, and the sale was not at an undervalue. It was done, in fact, to save the costs of foreclosure to which *Barnes* was entitled. The Plaintiffs had not been joined in their bill by any of the other children of the testator, and the acquiescence of the *cestuis que trust* averred in the answer must, in a proceeding of this kind, be admitted as true. As to the failure of the affidavit to aver that the documents did not impeach the Defendant's case, it was clear from the nature of the case that it could neither support the Plaintiff's nor impeach the Defendant's case; but in any case, that objection, if allowed, would only go to the sufficiency of the affidavit, and the Defendant was ready to supply the averment required if necessary.

(1) 11 Bligh, 112; 4 Cl. & Fin. 570; 2 Y. & C. 257.
(2) 3 M. & C. 526; 2 Keen 754.
(3) 2 M. & K. 732; 5 Sim. 640.
(4) 27 Beav. 62.
(5) 2 Ha. 166, n.
(6) 1 Y. & C. Ch. 631.
(7) 7 Beav. 291; 13 L. J. Ch. 226.
(8) 11 Beav. 91.
(9) 4 Drew. 522.

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SIR W. PAGE WOOD, V.C.:—

The case seems to me to fall clearly within the rule that requires production of the documents. The bill avers, and the answer admits, that *Mary Griffith* was the surviving trustee for sale, and a trustee of the purchase money as to part for the Plaintiffs; *primâ facie* therefore the Plaintiffs were entitled to require of any one holding the trust property, an account of the proceeds thereof. The Defendant refuses production, on the ground that he had lent money to the trustee for the purposes of the trust, and was therefore entitled to a lien on the trust property; and that being also a mortgagee whose interest was in arrear, he had been about to foreclose when an arrangement was come to by which the trustee conveyed free from the mortgage, and free from the equity of redemption of her the said *Mary Griffith*. His case is that he claims under this deed, and is, therefore, released from account; but if so, it is important to see how far the deed may shew on its face whether the moneys advanced were advanced in accordance with the trusts or not. There is in this no analogy to the case of a purchaser for value without notice. Independently of any question as to insufficiency in the averments of the affidavit, the deed and the contract leading to it were dealings with the trust estate, with full notice to the Defendant of the trusts, and the *cestuis que trust* have, therefore, a right to see them.

V.-C. W. 1865 *Nov.* 16.

EDWARDS *v.* WICKWAR.

Vendor and Purchaser—Conditions of Sale—General words—Concealment.

A condition of sale, providing that no requisition or objection should be made in respect of a specified underlease, or any other underlease prior to a certain specified date:—

Held, not to protect against requisitions in respect of an underlease, prior to the date mentioned, not specified in the conditions, and within the knowledge of the vendor at the time.

THIS case came on upon summons adjourned from Chambers. A decree had been made for the sale of leasehold estate, and the

property had been put up for sale under conditions, one of which was as follows:—

11th Condition.—"It will appear from the abstract that an underlease of the property was, in 1852, granted to *John Stone* for twenty-one years from the 25th of December then last. The said *John Stone* is believed to have absconded, and not to have paid any rent for several years past, and inasmuch as a fresh underlease was on the 1st of October, 1864, purported to be granted by the trustees of the will of the testator in the present cause to the present tenant who is in possession under it, no objection or requisition shall be made in respect of the underlease of 1852, or of any derivative interest created thereout, or of any underlease or tenancy prior to the said underlease of 1864."

Another underlease had, within the knowledge of the vendors, been made prior to 1864, to a gentleman of the name of *Palmer*.

At the sale one Mr. *Brayne* was declared purchaser, and an abstract was duly delivered to him. Notice of *Palmer's* underlease, and of the vendor's knowledge of it, appearing on the chief clerk's certificate in the cause, the purchaser returned the abstract with a requisition, among others, requiring an abstract to be furnished of *Palmer's* underlease, and that the underlease itself should be produced, and a surrender of it obtained at the vendor's expense.

The vendors declined to comply with this requisition, contending that it was covered by the general words in the condition that no requisition should be made respecting "any other underlease prior to 1864."

The purchaser being unwilling to proceed with the sale until the requisition was complied with, the vendors summoned him to show cause why he should not proceed, and the summons was adjourned into Court.

Mr. *Giffard*, Q.C., and Mr. *W. Forster*, for the vendors, contended that the objection taken by the purchaser was one which by the condition he was precluded from raising; that the words excluding requisitions in respect of "any other underlease" were inserted for the purpose of meeting this very case, and that the purchaser would have been in no respect better off had the underlease to

V.-C. W. 1865 EDWARDS v. WICKWAR.

Palmer been mentioned in express words in the condition than he was under the general words contained in it, and could not have been induced to bid by the suppression of express mention of that underlease.

Mr. *C. Brown*, for the purchaser, was not called on.

SIR W. PAGE WOOD, V.C.:—

I have no doubt on this case. It was the clear duty of the vendor to give the fullest information which he himself possessed as to the title. The object of special conditions of sale is to protect the vendor from inquiries which he himself may be unable to satisfy, and against objections which he cannot explain away. There may, indeed, be cases like *Freme* v. *Wright* (1), where assignees of a bankrupt have stipulated that such title only as the bankrupt had should be required by the purchaser, but even in that case it has been thought a stretch of the jurisdiction of the Court to force the title on a purchaser. There is in this case nothing analogous to such a state of things as occurred there. I do not wish to lay down any different rule regarding sales under the direction of this Court from that which prevails generally, but certainly the principles on which such sales are conducted ought not to be more lax as to the complete *bona fides* required than those which are held to govern in other cases. Here it was plainly the duty of the parties to disclose the underlease, and it would be most mischievous to allow a vendor to suppress facts known to him affecting the title, and yet compel a purchaser to accept it.

(1) 4 Madd. 364.

In Re JARMAN'S TRUSTS.

V.-C. W. 1865 Nov. 4, 6.

Will—Accruing Shares—Separate use—Costs of Legatees.

On a gift by will to testator's daughters, "the share or shares of such daughters to be for their sole and separate use," followed by a contingent gift over to the survivors:—*Held*, that the separate use attached to the accrued as well as to the original shares.

Where legacies were made payable out of residue which was insufficient, the fund being in Court, the legatees were held entitled to their costs out of the residuary fund.

GREGORY JARMAN by his will devised all the residue of his real and personal estates to trustees upon trusts for conversion and for the payment of the income of the trust funds to his wife for her life, and at the expiration of one year from his wife's decease to stand possessed of the trust funds, as to £1000, part thereof, for his two sons *Gregory* and *John*, absolutely in equal shares; and as to £6000, other part thereof, upon trust for his three daughters, *Mary Ann*, *Harriet*, and *Ellen Elizabeth*, in equal shares, as tenants in common; and as to the residue of the said trust estate, to pay and divide the same in the following proportions:—To his daughter *Mary Ann*, £200; to his daughter *Harriet*, £300; and the residue thereof to his daughter *Ellen Elizabeth*; "the share or shares of his said daughters, under his will, to be for their sole and separate use;" and it was provided that "in case any or either of his daughters should happen to die in the lifetime of his said wife without leaving lawful issue, then as well the original as all surviving or accruing share or shares of her or them so dying, of and in the said trust moneys and premises, should go and belong to the survivors or survivor of them, or her, or their executors and administrators."

The testator died in May, 1838, and the residuary trust estate got in by his executors was invested, and amounted to no more than a sum of £5631 2*s.* Consols.

The daughter *Ellen Elizabeth* died on the 5th of October, 1838, an infant and unmarried. The widow died on the 11th of March, 1865.

During the life of the tenant for life, the daughter *Mary Ann*,

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now Mrs. *Woods*, had mortgaged her reversionary share in £5600 Consols, part of the fund; and the mortgagees had sold the property so mortgaged to the Petitioners, who were also purchasers from the first mortgagees of the other daughter *Harriet*, now Mrs. *Eden*, of her reversionary interest in the whole fund.

The Petition prayed that out of the sum of £5631 2*s*. Consols, and a sum of £36 13*s*. 5*d*. cash, one-fourteenth might be carried to the account of each son; that a sum of £15 8*s*. stock (to answer the share in the £31 2*s*. stock remaining in Mrs. *Woods*) might be carried to her account; and the residue transferred to the Petitioners.

Mr. *G. M. Giffard*, Q.C., and Mr. *B. B. Rogers*, for the Petitioners.

Mr. *Beavan*, for a purchaser of the interest of one of the sons, asked for his costs against the Petitioners. As a general rule, a legatee's costs, on a petition as in a suit, would be payable out of his legacy, when the fund was in Court; but here the legacy was made payable out of residue. It was immaterial that the residue had failed.

Mr. *F. Hoare Colt*, for Mrs. *Woods*:—

The accrued share should be carried over to the account of Mr. and Mrs. *Woods*, with a view to a settlement.

The words "share or shares" in the clause declaring the trust for separate use, do not include an accrued share.

It by no means necessarily follows that a qualification attached to an original share applies by implication to accrued shares; *Gibbons* v. *Langdon* (1). The accrued share stands on the same footing as a new legacy.

The cases in which the Court has held accruing shares to be subject to the same qualifications as original shares have been either cases of consolidation where there was a gift "of *the whole*," or "of part and parts 'share and shares' *and interest*" of the person dying, to the survivor; as in *Sillick* v. *Booth* (2), and

(1) 6 Sim. 260. (2) 1 Y. & C. Ch. 121, 739.

Douglas v. *Andrews* (1), or where the qualification is necessary to the validity of the gift of accruing shares, 2 *Jarm.* on Wills (2).

Mr. *Edmund James*, for Mrs. *Eden*, supported the same construction.

Mr. *Bagshawe* for an incumbrancer.

Mr. *Renshaw* for the trustees.

SIR W. PAGE WOOD, V.C.:—

I think there is no reasonable doubt on this point. The only question is whether these words are sufficiently large to embrace accrued as well as original shares, so as to fix on all a limitation to the separate use. There is no conceivable reason why the testator should have limited the operation of the clause to one portion only of what he was giving to his daughters; and hence there is nothing to be derived from his presumed intention beyond the language of the will. If the words are large enough, everything is in favour of construing them as extending to all the shares. It has been contended that because the direction as to separate use is to be found only in the place where the original shares are given, it is limited to the original shares. But the other is the more natural construction; and without discussing the other question raised upon the authorities, I must decide that the accrued as well as the original shares are subject to the separate use clause.

Mr. *Giffard*, in reply as to costs.

SIR W. PAGE WOOD, V.C.:—

I am of opinion that as to the legacies given to the sons, inasmuch as they are payable out of residue, the legatees are entitled to their costs, although the residue has turned out insufficient. I can make no distinction between the brothers' legacy and the others; and thus the whole fund will be subject to one set of costs for the two brothers; to another for Mr. Bagshawe's client, and to the costs of the trustees.

I can give no costs to Mrs. *Woods* or Mrs. *Eden* as against their own mortgagees.

(1) 14 Beav. 347. (2) 3rd. ed. 671.

V.-C. W.
1865
Nov. 18.

In Re BROWN'S TRUST.

Power—Appointment—Excess.

By a marriage settlement a fund was limited, after the death of the survivor of husband and wife, to "all and every the children, or child, or more remote issue" of the marriage, as the wife should by deed or will appoint. By will, the wife appointed the fund to three new trustees upon trust to pay the income to her son (the only child of the marriage), for his life, or until he should become bankrupt, or should assign or incumber the same, and then to the trustees for his life, "for the benefit of her son, his wife and children, or any of them, as the trustees should think expedient." The son attained twenty-one, and assigned the share:—

Held, although the excessive appointment was discretionary only, that the appointment was void *in toto*, and not merely for the excess.

UNDER the marriage settlement of a Mr. and Mrs. *Brown*, dated in 1840, a fund was limited, after the death of the survivor of husband and wife, upon trust for "all and every the children, or child, or more remote issue" of the marriage, "in such shares and proportions, or for any one or more of such children or other issue exclusively of the others or other of them, at such age or ages, time or times, and subject to such conditions, restrictions, charges, provisions, and limitations over for the benefit of or relating to some or one of the said children or more remote issue, and with such provisions for maintenance, education, and advancement" as the wife "at any time or times during her life, by any deed or deeds, with or without power of revocation and new appointment," or by her last will, should direct or appoint; and "for want of such direction or appointment, or so far as no such direction or appointment should extend," upon trust for all and every the children and child of the marriage who, being a son, should attain twenty-one, or a daughter should attain twenty-one, or marry with consent.

There was issue of the marriage one child only, *William Henry Brown*, who had attained twenty-one.

Mrs. *Brown* survived her husband, and married *Henry Pritty*.

Mrs. *Pritty* died on the 20th of October, 1864, having by will, "in exercise and execution of the power" given or reserved to her

by the settlement, directed and appointed that from and after her decease the trust funds should be in trust for three persons whom she named upon trust to sell and invest as therein particularly mentioned, with power to vary securities, and to pay the interest dividends and annual income to *William Henry Brown* "during his life, or until he should become outlawed, or be declared a bankrupt, or should assign or incumber, or attempt to assign, charge, or incumber the income, or until the same, or some part thereof, through his act or default, or by act or process of law, or otherwise, if belonging to him absolutely, become possessed in or payable to some other person or persons;" and from and after the determination of the trust thereinbefore declared for the benefit of the said *William Henry Brown*, if the same should determine in his lifetime, then, upon trust thenceforth during his life, to pay the income "for the maintenance, education, support, or otherwise, for the benefit of the said *William Henry Brown*, his wife and children, or any of them, at such time or times, in such proportions, and generally in such manner as the said trustees or trustee for the time being should think expedient;" and, upon trust, to accumulate the surplus; and, from and after the death of the said *William Henry Brown*, should stand possessed of the trust funds and accumulations, and the interest thereof in trust for the child, if but one, or all the children, if more than one, of the said *William Henry Brown*, who, being a male or males, should attain twenty-one, or being a female or females, should attain that age, or marry, equally to be divided between them, if more than one.

On the 19th of October, 1865, *William Henry Brown* assigned his interest.

There was no question as to the appointment by Mrs. *Pritty* being in excess of the power; and the only doubt that was entertained was, whether the appointment was altogether void, or void only for the excess.

The Petitioners were *William Henry Brown* and his assignee.

Mr. *Rolt*, Q.C., and Mr. *Rendall*, for the Petitioners, submitted the question to the Court.

The original power, though it extended to more remote issue of

V.-C. W. 1865 BROWN'S TRUST.

the marriage than children, *might* yet have been exercised in such a manner as not to infringe the rule against remoteness.

But there could be no doubt as to the invalidity of this appointment. Mrs. *Pritty* had not only nominated new trustees, and given them a wide discretionary power; but she had made her son's life-estate defeasible on any attempt even to incumber; she had inserted a discretionary trust for the benefit of her son's wife, a stranger; she had added a trust for accumulation, and had appointed the fund to the children of her son who should attain twenty-one, without restriction as to the time when they should be born.

The only question was, whether, as in the case of *Alexander* v. *Alexander* (1), inasmuch as the gift to the wife of the son was discretionary, that clause might be struck out of the will, and the appointment held good for the life of *William Henry Brown*, or until his assignment (the effect of which, in the event that had happened, would be to place the income out of his reach for his life); or (which seemed the better opinion) whether the whole appointment was void, and the assignee of *William Henry Brown* took absolutely.

Mr. *Springall Thompson*, for the trustees of the settlement.

Mr. *Amphlett*, Q.C., for the trustees who were appointed under Mrs. *Pritty's* will.

SIR W. PAGE WOOD, V.C.:—

I think this case is quite clear. It is obvious that as to some of the objects of it, the appointment is in excess of the power; as to others it may be within it; but as I cannot possibly define the class which may fall within the power, and those which must be without it, I cannot make any distinction, and I must therefore hold that the whole gift fails.

Mr. *Amphlett*, Q.C., asked for the costs of proving Mrs. *Pritty's* will.

The VICE-CHANCELLOR:—I cannot give you the costs of proving the will. All the other costs will come out of the fund.

(1) 2 Ves. Sen. 640.

LINGWOOD *v.* STOWMARKET COMPANY.

V.-C. W.
1865
Nov. 9, 15.

Practice—Injunction—Nuisance—Form of Order.

In an order for an injunction to restrain Defendants from polluting a stream, it is proper to insert the words "to the injury of the Plaintiff," in order to establish a ground for the interference of the Court, and to prevent its authority being invoked for trivial purposes.

IN this case an interim injunction had been granted restraining the Defendants, the *Stowmarket Paper-making Company, Limited*, from discharging refuse from their works into a river, and it was now moved to make the injunction perpetual.

The Defendants submitted to the motion, and the only point to be considered was whether the words, "to the injury and damage of the Plaintiff" ought to be inserted in the order; the Defendants contending that without them it might be held they were restrained from pouring anything, however minute in quantity, except pure water, into the river, and the Plaintiff maintaining that the words were unnecessary and erroneous.

Mr. *Phear*, in support of the motion.

Mr. *Eddis* and Mr. *Downing Bruce* for the Defendants.

The VICE-CHANCELLOR thought the words ought to be inserted, because the Plaintiff must be damaged in order to entitle him to relief; and in this instance it was possible that the Defendants might pour their noxious liquid into the river in such small quantities as not in any way to affect or injure the Plaintiff, whose mill was four miles lower down the stream. His Honour said he would mention the point again.

Nov. 15. SIR W. PAGE WOOD, V.C.:—

The only question is as to the insertion of the words, "to the injury and damage of the Plaintiff," in the order whereby the Defendants are to be restrained by perpetual injunction from pouring the refuse of a paper mill into a river.

I do not find any regular course of authority established on the

V.-C. W. 1865 LINGWOOD v. STOWMARKET COMPANY.

point, but what was done by Vice-Chancellor *Wigram*, in framing an issue to be tried by a jury in the case of *Dawson* v. *Paver* (1), was, to insert the words I have mentioned. The terms of the issue were, "Whether the drainage made, or effected, or intended, at the time of the filing of the Plaintiff's bill, to be made or effected by the Defendants, into the ancient watercourse in the pleadings mentioned, will or would, if completed, *to the damage and injury of the Plaintiff*, obstruct the drainage of the Plaintiff's lands;" the object being to point the consideration of the jury to the question whether substantial damage would be done if the proposed works were carried out. And this direction was expressly carried into effect by the declaration, a minute of which is given at the end of the report (2); for the words are to restrain the Defendants from using the drain, &c., without providing an outlet sufficient *to prevent the drainage of the Plaintiff's lands being obstructed.* The words imply that there must be some injury to the Plaintiff.

In Mr. *Bidder's* case, where I particularly took care to show that it was a matter of doubt whether the discharge of offensive matter into the river would affect a resident living two or three miles down the stream, I came to the conclusion that evidence of some degree of injury did exist, but that it was by no means clear that that might not be avoided, and the nuisance wholly prevented by the noxious matter being absorbed before it could reach the land of the Defendants; and, accordingly, I find the words, "to the injury of the Plaintiff," inserted in the minute of the decree, as given in the last edition of Seton on Decrees, p. 894.

Therefore, I propose to put the order in this form, almost following the words of the notice of motion:—"Let a perpetual injunction be awarded to restrain the Defendants, the *Stowmarket Paper-making Company, Limited*, their servants, agents, and workmen, from discharging from their works, in the Plaintiff's bill mentioned, into the weir or stream in the bill also mentioned, to the injury and damage of the Plaintiff, so as to cause it to flow to the Plaintiff's land, messuage, and mills therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the Plaintiff, any such refuse or other

(1) 5 Ha. 422. (2) *Ibid.* 439.

matter as was discharged by the Defendants from their said works into the said river or stream previously to the filing of the said bill, or any noxious fluid or other foul matters whatsoever to the Plaintiff's injury or damage."

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I desire to add that whilst I do not wish to encourage application to the Court upon trivial matters, on the other hand, I am far from holding out the notion that anything like large or heavy damages must be recovered before the Plaintiff can be assisted. I can find no other cases besides those I have mentioned, in which these words have been actually inserted, but in almost all the cases words are used which involve the necessary condition of injury being done. I think, therefore, as that is so, and as I have adopted that course on a former occasion, that I must do the same here, and put the order in the same form as was done in Mr. *Bidder's* case. The two cases are very similar; only here the alleged evil takes place higher up the stream. There may be means of purifying the stream before it reaches the Plaintiff's works, but if it does reach them in a polluted state, he has a right to be protected.

In Re BETTY SMITH'S TRUSTS.

V.-C. W.
1865
Nov. 18, 20.

Will—Estate by implication—Gift over.

Gift of personalty, by will, after the death of *J*, (to whom an annuity was given out of the fund), to *E* during her natural life, but in case of the death of *E* during the lifetime of *J*, then to *M* for life; and after the decease of both *E* and *M*, then over :—

Held, that there was sufficient indication of the testator's intention to give a life estate to *M* after the death of *E*, although *E* did not die in the lifetime of *J*.

16 Ra 303.
5th D. 992
11th D 875

BETTY SMITH, spinster, by her will directed her trustees to invest the residue of the moneys arising from the sale and conversion of her real and personal estate, and out of the same moneys to pay and apply the sum of £52 annually, by weekly payments of 20*s.* a week, to her brother *Joseph Smith*, during his life; and then that they "should stand possessed of and interested in the residue of the said trust moneys, and of all other moneys, after the death of her said brother *Joseph*, in 'trust,' in the first place, to pay

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BETTY SMITH'S TRUSTS.

unto the Reverend *Richard Loxham* and the Reverend *Thomas Loxham*, the legacies or sums of £30 each, but in case of the death of either of them, during the lifetime of the said *Joseph Smith*, then the same legacy to be paid to the survivor of them, but in case both should die during the lifetime of the said *Joseph Smith*, then the same to fall in and become part of the residuary personal estate; and in the next place to pay to *Emma Fisher*, widow, the sum of £60, but in case of her death in the lifetime of the said *Joseph Smith*, then to pay and divide the same amongst her four daughters equally; and as to one-fifth part or share of her residuary personal estate after the death of her said brother *Joseph*, to pay and divide the same equally unto and amongst all the children of the late *Betty Molineux*, and the issue of such of them as should be dead; and as to two other fifths of the residue of her personal estate after the event aforesaid, to pay the interest thereof unto *Ellen Eckersley*, spinster, during her natural life, but in case of the death of the said *Ellen Eckersley during the lifetime of her said brother Joseph*, then she directed the same interest to be paid to the Petitioner *Mary*, then the wife of *John Collier*, during her natural life, whose receipt should be a sufficient discharge, which interest should be free from the debts or control of the said *John Collier;* and *after the decease of both of them, the said Ellen Eckersley and Mary Collier*, then the same interest, and the stocks, funds, and securities belonging thereto, she directed to be paid" in thirds to the persons in the will mentioned.

The testatrix died on the 7th of July, 1848. *Joseph Smith*, the annuitant, and brother of the testator, died on the 29th of December, 1858; and *Ellen Eckersley* died on the 16th of May, 1864.

The two fifths, a life interest in which was bequeathed to *Ellen Eckersley*, were represented by a sum of £713 6*s.* 11*d.* stock, the dividends of which had been paid to her during her life.

Mary Collier now claimed the dividends on this sum of stock for her life, from *Ellen Eckersley's* death; but the trustees declined to pay them over without the sanction of the Court, inasmuch as *Ellen Eckersley* did not die in the lifetime of *Joseph Smith.*

This Petition was accordingly presented by *Mary Collier*, for a declaration that she was entitled to the dividends for life, and payment accordingly.

The persons interested in the residuary bequest after the deaths of *Ellen Eckersley* and *Mary Collier* had been served, but did not appear.

Mr. *Morris*, for the Petitioner:—

The presumption of the Court will be against intestacy during the life of the Petitioner, which must be the result, if she be held not entitled. No doubt the Court must go the length of adopting a construction which would be the same thing as striking out of the will the words "during the lifetime of my said brother *Joseph;*" but thus much it has not hesitated to do, where the words were clearly opposed to the testator's intention; *Hart* v. *Tulk* (1); *Pasmore* v. *Huggins* (2). The fact of there being no gift over until the death of both *Ellen Eckersley* and the Petitioner raises a presumption in favour of the intention to give them life estates in succession.

Mr. *Whitbread* for the Duchy of *Lancaster*, which was entitled in the event of there being an intestacy during *Mary Collier's* life:—

The cases cited are instances of manifest clerical error, which cannot be suggested here. The language is a correct expression of intention so far as it goes, but there is an omission to provide for a particular event which has happened.

Mr. *Druce*, for the trustees, suggested, in aid of the Petitioner's argument, that inasmuch as *Joseph Smith* was an annuitant only, and not tenant for life, the Court would read the will as giving to *Ellen Eckersley* and *Mary Collier* successive life estates in the two-fifths, *subject only to the annuity*, as was done in the case of *Key* v. *Key*. (3)

Mr. *Morris*, in reply.

Nov. 20. SIR W. PAGE WOOD, V.C.:—

This case arises upon the construction of a will by which the testatrix, after giving an annuity to one *Joseph Smith*, being apparently desirous that the division of her property should not

(1) 2 D. M. & G. 300. (2) 21 Beav. 103. (3) 4 D. M. & G. 73.

V.-C. W. 1865 BETTY SMITH'S TRUSTS.

take place till after the death of the annuitant, directs that, as to two-fifths of the residue, the interest thereof shall be paid to *Ellen Eckersley* during her life; but in case of the death of the said *Ellen Eckersley* during the lifetime of the annuitant, then that the same interest shall be paid to *Mary Collier* during her life; and after the decease of both of them, the said *Ellen Eckersley* and *Mary Collier*, then the trust funds to go over. The facts are, that *Ellen Eckersley* received the interest during her life, and survived the annuitant; and the question is whether the Court can construe these words as giving to *Mary Collier* a life interest by implication.

Though the point is by no means clear, I think there is enough in this will to enable me to collect that this was the intention of the testatrix. It is to be observed that she gives other legacies, and directs them to cease or to go over, in the event of the death of either of the legatees in the lifetime of *Joseph Smith*; in other words, she refers them all to the death of *Joseph Smith*, and, in giving the life estate to *Ellen Eckersley*, she seems to have had in her mind the possibility of *Mary Collier* being alive at that period, and *Ellen Eckersley* not; and in that event she makes the gift to *Mary Collier*.

If the case stood there, it appears to me there would be very great difficulty in holding *Mary Collier* entitled to a life interest. But I think the fact of there being an actual gift to one of the two persons, and a gift over after the death of both of them, does authorize me to say that *Mary Collier* took a life interest, although the expressed event in which she was to take was not the event that occurred.

The case of *Key* v. *Key* (1) turned only upon this. The testator gave to *S K* certain real estate for life charged with annuities, "but in case the annuitants, or any of them, should survive *S K*, he then gave the estate to the eldest surviving son of *S K*: charged with the said annuities." *S K* survived all the annuitants, and the Court read the words "in case the annuitants, or any of them, should survive *S K*," as if they had not stood where they were, but had been inserted immediately before the word "charged."

(1) 4 D. M. & G. 73.

The words in that case were not so difficult to construe as those I find here, though in both cases there is an indication of the contingency of the annuitant surviving the tenant for life, which did not occur.

Another case was that of *Hall* v. *Warren* (1), in which part of my decision was overruled and part affirmed. In that case there was a gift of residuary real estate to a charity, and, in the event of the inhabitants of the parish not appointing a committee, or declining to carry out the scheme, then a gift over of all the property "so given" to the charity. Of course the gift to the charity failed; there was no parish meeting, and I considered that, the first gift failing by operation of law, I could not hold, as was held by the Vice-Chancellor of *England* in *The Attorney-General* v. *Hodgson* (2), that the limitation over failed also. I considered the true intent and meaning of the testator to be that, if the prior gift was out of the way, then the gift over was to take effect: *Warren* v. *Rudall* (3). The present Lord Chancellor (Lord *Cranworth*) took the same view, adding that it was not necessary to rely on the cases of *Avelyn* v. *Ward* (4), and *Jones* v. *Westcomb* (5). In those cases the apparent contingency on which the gift over was to take effect never did take place, and the Courts held that, if the prior gift be by any means whatsoever taken out of the case, then the subsequent gift takes effect. It is true that, in *Hall* v. *Warren*, the present Lord Chancellor observed that the actual contingency on which the houses were given to the respondent had happened, for the inhabitants had not met and appointed a committee and trustees; and that if they had done so, a question would have arisen whether the principle of the cases he had referred to did not apply. I confess I have great difficulty in applying that observation; because, if the inhabitants had done the absurd and unnecessary act of meeting to appoint a committee, the gift to the charity must, I should think, have remained in precisely the same condition as it was before.

Upon the whole, therefore, I think, I can collect from this will that the expression of this contingency was simply intended by

(1) 9 H. L. C. 420.
(2) 15 Sim. 146.
(3) 4 K. & J. 603.
(4) 1 Ves. sen. 420.
(5) Prec. Ch. 316; 1 Eq. Ca. Abr. 245, pl. 10; Gilb. 74.

V.-C. W. 1865 — BETTY SMITH'S TRUSTS.

the testator to imply that the subsequent gift was not to take effect in derogation of the preceding estate; and if so, the Court will give effect to it. I think the circumstances afford a sufficient *indicium* to the Court that the object of the testator in mentioning this contingency was only to express the intention that, if *Mary Collier* took at all, she must not interfere with *Ellen Eckersley*, and that, when both were dead, and not till then, the estate was to go over. There must be a declaration according to the prayer of the Petition.

V.-C. W. 1865 — *Nov.* 2, 3, 4.

PICKERING *v.* CAPE TOWN RAILWAY COMPANY.

Jurisdiction—Arbitrator—Waiver of Arbitration.

There is no original jurisdiction in the Court of Chancery in the nature of a writ of prohibition, to restrain an arbitrator from proceeding to make an award; the only ground on which the court will interfere, prior to the award being made, is such, if any, as may be afforded by the conduct of the parties.

The repudiation by a Railway Company of a contract for the completion of their line, followed by seizure of the works under an order of a Colonial Court:—

Held, a waiver on their part of the right to proceed by arbitration under the same contract, with reference to the question of the legality of the seizure, and all matters involved in and dependent upon such question.

THIS was a motion to restrain an arbitrator from making an award.

The suit was instituted by a contractor against the *Cape Town Railway and Dock Company*, and the bill prayed for declarations of the Plaintiff's rights upon the construction of certain contracts into which the parties had entered, and for inquiries and accounts on the footing of those declarations.

The facts, so far as they are necessary to shew the ground of the motion, were as follows:—

Under a contract, dated in December, 1858, the company agreed with the Plaintiff for the execution of certain works for the sum of £400,000. There was to be a standing referee, whose powers and authorities were to exist until "the full and final completion, in all respects, and opening of the whole railway had

been certified by the colonial engineer." Mr. *Hawkshaw* was appointed standing referee, and the works were commenced.

In August, 1860, a supplemental contract was entered into between the parties, and this was followed by others. The supplemental contract contained a clause (7), providing that if the contractor should, from any cause not attributable to any improper act or any neglect or default of the company, or to circumstances beyond his control, neglect or omit to complete the railway, &c., as to part, on the 5th of April, 1861, and as to other part on or before the 5th of October, 1861, the company should be entitled, on giving fourteen days' notice, to take the railway works out of the contractor's hands, and that all such payments as might be required to be made, and should in fact be made by the company, in completion of the contract, and the amount of any penalties payable by the company, should be deducted out of the moneys in their hands remaining unpaid on the contract.

On the 6th of April, 1861, the company wrote, threatening to exercise their powers of taking possession, on the ground of non-completion; and on the 7th of October a similar notice was given by the company with respect to the rest of the line.

The Plaintiff refused to give up possession, asserting that the failure to complete was attributable to acts of neglect and default on the part of the company; and the dispute having been carried so far as to bring about a conflict between the workmen of the respective parties, the company, on the 22nd of October, obtained an order of the Supreme Court of the Cape Colony, empowering them to take possession; but the order (as was alleged, and not denied) contained a proviso that the company should, on or before the 1st of November then next, declare in an action to establish their right to have permanent possession of the railway and works.

No action was brought; and the company proceeded to complete the line, which was opened on the 4th of November, 1863.

The company, notwithstanding the seizure of the works, insisted on their right to proceed by arbitration "on most if not all" of the matters in dispute between the company and the

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contractor; and amongst those matters was a claim to have the works which had been executed by the company since the seizure included in the original contract. Thus the question of the legality of the seizure under the terms of the contract became one of the matters of reference.

The Plaintiff resisted, and on the 25th of August, 1865, Mr. *Hawkshaw* wrote to the Plaintiff's solicitors, giving them notice that, unless restrained by an order of the Court of Chancery, he should, on the 5th of October then next, proceed to hear and determine the matters referred to him. This bill was then filed on the 11th of September, making Mr. *Hawkshaw* a defendant. He did not appear on this motion.

The bill prayed, amongst other things, for a declaration that, under the circumstances in the bill stated, the company were not entitled to determine the contracts as they had done; also that it might be declared that the duties, powers, authorities, and jurisdiction of the Defendant, *John Hawkshaw*, as standing referee under the contracts named, absolutely ceased and determined at the time when the company entered into possession of the works, or, at all events, on the 4th of November, 1863; and that the company might be restrained from taking or prosecuting any proceedings whatever, for obtaining from the Defendant *John Hawkshaw* any award upon any question in difference between the Plaintiff and the company under the contracts or any of them.

There was a cross motion on behalf of the Defendants, the company, to stay all further proceedings in the suit.

Mr. *Rolt*, Q.C., and Mr. *Locock Webb*, for the Plaintiff:—

First, upon the construction of the contracts, Mr. *Hawkshaw's* jurisdiction ceased, either when possession was taken by the company, or at least when the line was opened; and, secondly, the company, by selecting another tribunal, waived their right to proceed by arbitration.

Sir *H. Cairns*, Q.C., Mr. *G. M. Giffard*, Q.C., and Mr. *Bedwell* for the Defendants:—

There is no recorded instance, in which, this Court has interfered

with the making of an award by an arbitrator; and for the manifest reason that such an interposition would be premature. The only case in which the question was touched was that of *Maunsell* v. *The Midland Great Western (Ireland) Railway Company* (1), but in that instance not merely the right of the arbitrator to proceed, but the whole agreement was impeached, and at the suit of a shareholder. That case, therefore, has no bearing on the present.

But, even assuming the jurisdiction, the powers of the standing referee have not ceased. [This portion of the argument turned upon the construction of the contracts.] In the argument in support of the cross motion, it was admitted that, prior to the Common Law Procedure Act, a Court of equity, at the hearing of a cause, if it found that the parties had agreed to refer, and to make the submission a rule of Court, and had named arbitrators, with a covenant not to sue, would have dismissed the bill; *Dimsdale* v. *Robertson* (2). But by the 11th section of the Act (17 and 18 Vict. cap. 125), the Court has express jurisdiction to stay proceedings, where the parties, before suit, have agreed to arbitration, even before answer.

SIR W. P. WOOD, V.C.:—

I quite agree with many of the observations made with reference to this being a totally new course of proceeding—to interfere with an arbitrator on the ground that he is about to assume a jurisdiction which he has not, and to prohibit him from proceeding in the matter. That is, in fact, the relief asked against Mr. *Hawkshaw*. We have nothing in this Court in the nature of a writ of prohibition authorizing the Court to proceed against an arbitrator, and the only jurisdiction that exists to stop the proceedings before arbitration is founded upon the conduct of the parties. If, for example, Defendants are seeking to enforce certain rights which they conceive they are entitled to exercise under a deed for submission to a reference, and the Court should be of opinion that they have debarred themselves from exercising those rights by the course of conduct which they have adopted, there arises an equity, which prevents them from prosecuting proceedings, however they might otherwise be

(1) 1 H. & M. 130. (2) 2 Jo. & Lat. 58.

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entitled to do so under the particular jurisdiction which is beyond the control of this Court.

[His Honour then discussed the provisions of the deeds whereby the standing referee was appointed, and the subsequent contracts; and without expressing any final opinion, which he said would more properly be reserved till the hearing, considering that he had not heard the reply, gave it as his present impression that Mr. *Hawkshaw's* powers had not ceased with the seizure by the Defendants of the railway works, and continued :—]

I only say that, as at present advised, I should not proceed upon the notion that Mr. *Hawkshaw's* powers are extinguished; but what I do proceed upon is this: in the first place, I have very great doubts indeed whether they ever extended to this particular contingency which has happened; but if they do so extend, then I am clearly of opinion that as to that they have been waived; and it is impossible now for the Defendants, having waived those powers, to assert the jurisdiction of Mr. *Hawkshaw* in contradiction of the ordinary tribunals of the country from which the Plaintiff has sought relief.

[After some further exposition of the facts, his Honour concluded thus :—]

That being the course taken, it is too late now to say that the Plaintiff, having been dispossessed by another tribunal to which the Defendants themselves applied, is not to have the benefit of the ordinary tribunals, but is limited to the jurisdiction of Mr. *Hawkshaw* as sole referee. Therefore if, independently of Mr. *Hawkshaw's* powers, the Plaintiff is right in coming to this Court, it appears to me perfectly plain that the Defendants, who placed themselves in this position by having recourse to other tribunals which they themselves have selected, are not entitled to say, "We will place ourselves again in the *forum domesticum*, and you shall not defend yourself, or have any remedy against our proceedings, except through that medium of arbitration which we ourselves have rejected and declined."

It appears to me that the Defendants have by their conduct (for that is the only ground upon which I can interfere with this arbitration) precluded themselves from proceeding until the hearing. What may be determined at the hearing, as to whether or

not the company were justified in their seizure, is another thing. It is possible that some of the powers or authority of Mr. *Hawkshaw* may yet remain with reference to the settlement of the disputed items and the like; but I am quite clear that this great and main question cannot be decided through his medium, and until that is decided, it would be of no use whatever to proceed with the reference. Therefore I restrain the Defendants, the company, from proceeding in the reference before Mr. *Hawkshaw* till the hearing or further order; and upon the motion to stay proceedings I decline to make any order. That motion is refused with costs.

From this order the Defendants appealed, and the appeal was argued before Lord CRANWORTH, L.C., on several days.

Sir *H. Cairns*, Mr. *G. M. Giffard*, Q.C., and Mr. *Bedwell*, for the Defendants.

Mr. *Rolt*, Q.C., and Mr. *L. Webb*, in support of the bill.

Dec. 18. Mr. *Giffard* was about to begin the reply on the part of the Defendants, when the Lord CHANCELLOR asked if the Defendants were willing, supposing the order to be discharged, not to act upon any award except under the sanction of the Court. If so, the Lord CHANCELLOR could not make any order to restrain the arbitration from proceeding, this being an interlocutory motion, and not tending to the final disposal of the cause.

Mr. *Giffard*, on behalf of the company, was willing to give the undertaking.

The LORD CHANCELLOR then said that no doubt there was jurisdiction in the Court to take this account, notwithstanding there was an agreement to refer. The parties could not oust the jurisdiction of the superior courts by any contract to refer, and but for the doubt raised by the case of *Dimsdale* v. *Robertson* (1), his Lordship would have thought that that did not make any difference at all. At the same time, the *Common Law Procedure Act* had introduced a very wholesome provision that where there was a reference going on it should be competent for the Court to stay the proceedings pending the reference. The Vice-Chancellor might have come to a correct conclusion as to the parties having by their

(1) 2 Jo. & Lat. 58.

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conduct excluded themselves from the benefit of their contract to arbitrate, but his Lordship could not see his way to that conclusion until the cause was heard. Some matters did seem to be excluded from the arbitration, but some remained. It was, however, quite clear that the legislature never intended that where a reference and a suit were going on together the Court should not have power to stay proceedings.

The order finally made was to discharge the order of the Vice-Chancellor. Let both motions stand over with liberty to apply. The reference to go on, the Defendants undertaking not to take any proceedings upon any award without the leave of the Court.

V.-C. W. 1865 *Nov.* 8, 9, 10, 24.

HILL *v.* CURTIS.

Executor de son tort—Settled account—Discharge.

At law an executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative, before action brought.

If an executor *de son tort* hands over part of the property of which he has wrongfully possessed himself to a second person, that person may possibly be sued in equity; but he is not liable as executor *de son tort*.

The rule in equity follows the rule at law; so that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account.

Dictum of Lord Cottenham in *Carmichael* v. *Carmichael*, 2 Ph. 101, dissented from.

5 QB 115-7
16 E 546
17 E 299
9 QB 183.

THIS was a bill for an account of the personal estate of an intestate, against two of the Defendants as executors *de son tort*.

The Plaintiffs were two infant daughters of *Henry Hill*, late of *Portsea, Hants*, a farmer, market gardener, and contractor for the supply of vegetables to the navy, who died on the 24th of November, 1855, leaving a widow and several children. The Defendants, against whom relief was sought, were *George Curtis* the elder, and *George Curtis* the younger, who were hay and corn dealers of *Portsmouth*, and creditors of *Hill* to the amount of £1680.

The bill stated that on the day after the intestate's death the

Defendants *Curtis*, "as executors *de son tort*," took possession of all the deceased's live and dead farming stock, personal property, and effects, and proceeded to deal with and dispose of the same, and, "as such executors," to receive several of the debts; that they instructed their solicitor to insert an advertisement in the *Hampshire Telegraph* desiring all parties having claims on the estate to send in the particulars to him; and caused a valuation to be made of the live and dead stock and farming effects.

Further, that the Defendants induced the widow and her daughter, the Defendant *Eliza*, being wholly under their influence, to sign a request to them to apply for letters of administration, which, on the 7th of February, 1856, were granted to the widow; but the Defendants never delivered up to the administratrix possession of the personal estate so taken by them.

The widow died on the 24th of March, 1856; and the bill stated that the Defendants still continued to act as such executors *de son tort*, and retained possession of and realized the personal estate not already realized.

On the 16th of October, 1856, letters of administration of the remaining estate and effects were granted to the eldest daughter, *Eliza Hill*, who, in February, 1857, married *James Dennison*. She and her husband were made Defendants.

The bill stated that the Defendants *Curtis* never delivered up to *Eliza Dennison* the personal estate so taken by them; but "they induced her to act in relation thereto as they directed."

The bill then charged that the Defendants *Curtis* "took exclusive possession of the deceased's estates and effects as aforesaid, and managed and used and worked and sold the same, and whilst so doing, they designedly prevented letters of administration to the estate and effects being obtained, for such time as they, for their own advantage and profit, thought proper to delay the same;" and prayed for an account of the personal estate come to the hands of the Defendants *Curtis*, or either of them, as executors *de son tort* of the deceased, and for payment; also that the Defendants Mr. and Mrs. *Dennison*, might account for the personal estate come to the hands of them or either of them.

There was no legal personal representative of the widow, the first administratrix.

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G. Curtis the elder, by his answer, denied that he took possession, or gave directions, or interfered in any way whatever in the testator's estate or affairs. He believed that his son did assist in managing the estate; but he said that the account rendered by his son was made out erroneously as the account of "*G. & G. Curtis*," whereas it should have been in the name of the son only.

G. Curtis, the younger, by his answer, said that, as upon *Henry Hill's* death, there were several uncompleted contracts on hand, and several creditors besides the Defendants, it was resolved by all parties, including a solicitor, acting separately for the benefit of the family, that the farms should be continued for the present and the contracts completed, and that *Ann Hill* should take out letters of administration. She accordingly applied for and obtained letters of administration, and proceeded with the cultivation of the farms and the execution of the contracts.

He further said, "Prior to and in contemplation of the widow obtaining such grant, I at her request and under her authority, as her agent, assisted her in getting cash for a navy bill received by her in payment of moneys due in respect of the contracts, by negotiating the sale of certain parts of the live and dead stock, and by making payments for rent, taxes, and tithes, in respect of the said farms, and for supplies purchased for the purpose of completing the contracts, as well as making the necessary payments in respect of the letters of administration. And after the said *Ann Hill* took out administration to the estate, I continued, at her request and under her authority, as her agent to assist her in a similar manner until her decease."

When the widow died, it was arranged that the daughter, *Eliza Hill*, should take out administration, and that she should carry on the farms and complete the contracts, and she accordingly applied for and obtained such grant and proceeded accordingly. The Defendant, *Curtis*, the younger, at her request and under her authority, received the proceeds of the sale of some wheat and barley, and obtained cash for some navy bills, out of the proceeds of which he made advances to her and to *W. H. Gough Hill*, the eldest son of the deceased.

At a meeting of the creditors held on the 10th of December, 1856, an account of the said Defendant's receipts and payments

(which account was erroneously made out in the name of his father and himself, instead of in his name alone) was duly examined and settled by Messrs. *Ford*, the solicitors of Miss *E. Hill*. This account shewed a balance due to the estate of £1268.

At the same meeting terms of an arrangement were settled and agreed to, which were carried into effect by a deed dated the 10th of December, 1856, and made between *Eliza Hill* of the first part, *James Dennison* of the second part, and the creditors of the third part, which recited that the unadministered goods and effects consisted of £1268 in cash and Government bills then in the hands of Messrs. *G. & G. Curtis*, "held by them for and on account of the said *Eliza Hill*, as such administratrix as aforesaid." By the same deed the sum of £1268 was with other property assigned to *James Dennison* as trustee for the benefit of the creditors; some of whom had agreed to accept a composition of 12*s.* 6*d.* in the £1 in full discharge, and others a dividend of 11*s.* 6*d.* in the £1 as a first dividend.

The balance of £1268 consisted of £406 in Government bills, and £862 in cash. Immediately after the execution of the deed the bills were handed over to *Dennison*, and the sum of cash was retained by the Defendant *Curtis*, the younger, in part payment of the dividend of 11*s.* 6*d.* in the £1 on the debt due to his father and himself, and a cheque for the balance, amounting to £104, was handed to the said Defendant by the Messrs. *Ford*.

Curtis, the younger, denied having taken possession otherwise than as before mentioned. He admitted having caused the valuation to be made, and said that was done with a view to administration under the authority and as agent for *Ann Hill*. He said generally that, so far as he had meddled with any part of the personal estate, he did so at the request, and by the authority, and as agent of *Ann Hill* up to her death, and of *Eliza Dennison* after that period; and that he had fully accounted.

The case of the Plaintiffs, in so far as it charged the Defendants *Curtis* with improper conduct, was supported mainly by Mr. and Mrs. *Dennison*, and, to some extent, by other members of the family, who deposed to a series of alleged acts of oppression and injustice on the part of the Messrs. *Curtis*, and upon this evidence they were cross-examined in Court.

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Mr. *G. M. Giffard*, Q.C., Mr. *Hawkins*, Q.C. (of the common law bar), and Mr. *Horsey*, for the Plaintiffs:—

The bill alleges that both the Defendants (and the younger *Curtis*, at least, does not deny that he, for one) intermeddled with the estate both before the grant of administration to Mrs. *Hill* and during the interval between her death and the grant to Miss *Hill*; not merely that he received property, but that he bought and sold and carried on the intestate's business. But he insists by his answer that he was acting only as agent, first for one and then for the other, both of them afterwards becoming rightful owners; and he sets up the settled account between himself and the administratrix. Now whatever may be the rule at law with regard to an executor *de son tort*, who hands over property he has received, it is clear that persons in the position of these Defendants cannot clear themselves by pleading a settled account with the rightful representative, the rule in equity being that an executor *de son tort* cannot discharge himself without suit. This was decided by Lord *Cottenham* in *Carmichael* v. *Carmichael* (1). If it were otherwise, an executor *de son tort* would be in a better position than an ordinary executor, who cannot discharge himself from liability by simply accounting to his co-executor.

Further, an agent of one who afterwards becomes an administrator is in no better or other position than an executor *de son tort*; he is liable to precisely the same extent: *Sharland* v. *Mildon* (2). See also 1 Wms. Exs. (3).

Mr. *Casson* (with him Mr. *Willcock*, Q.C.), for *George Curtis*, the elder, submitted that, even if the Court should hold the younger *Curtis* to have been in wrongful possession, the mere fact of his having handed over the property to his father, without more, could not make the latter an executor *de son tort*; and cited *Paull* v. *Simpson* (4).

Mr. *Rolt*, Q.C., Mr. *Charles Hall*, and Mr. *Henry Matthews*, for *George Curtis*, the younger:—

The position of the younger *Curtis* was that of an agent

(1) 2 Ph. 101.
(2) 5 Ha. 469.
(3) 4th Ed. 225.
(4) 9 Q. B. 365.

employed by a person who was afterwards duly appointed executrix. The appointment of the principal as administratrix gives validity to all the acts of the agent. It matters not whether a person be authorized to act as agent or not, if his acts be afterwards adopted by the person who becomes the legal personal representative, they are valid; for the title of administrator relates back to the date of the death of the intestate: *Foster v. Bates* (1). The case of *Sharland* v. *Mildon* (2) establishes this, that if the widow had died after employing *Curtis*, the younger, but *without getting* letters of administration, and another person had obtained the grant, *Curtis* would have been liable; for the doctrine that the possession of an agent is the possession of a principal, has no application to the case of a wrong-doer. But in this case the widow *was* duly appointed.

The utmost that is shewn by *Carmichael* v. *Carmichael* (3) is, that there are circumstances under which a settled account will not be deemed a discharge in equity, as it usually is.

The rule at law is thus stated by Mr. *Justice Williams*:—"So he may give in evidence, under the plea of *plenè administravit*, that he has delivered the assets to the rightful executor or administrator before action brought": 1 Wms. E. s. (4), following *Curtis* v. *Vernon* (5), S.C., an appeal in Ex. Ch.; *Vernon* v. *Curtis* (6); and this rule is followed in equity.

The defence, therefore, of the younger *Curtis* was—first, that he was not an executor *de son tort*, but merely an agent; secondly, that, when the principals obtained letters of administration, their titles respectively related back to the death of the testator, and rendered valid all the acts of their agent; thirdly, that, whether as agent or executor, he had fully accounted. See *Tyler* v. *Bell* (7).

An executor *de son tort* cannot file a bill and get a discharge from the Court; then in what position is he placed if a settled account with the duly appointed executor or administrator is not sufficient to discharge him?

(1) 12 M. & W. 226.
(2) 5 Ha. 469.
(3) 2 Ph. 101.
(4) 4th Ed. 219.
(5) 3 T. R. 587.
(6) 2 H. Bl. 18.
(7) 2 M. & Cr. 89.

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The suit is defective because the representative of the widow is not a party; and it is not for the benefit of the infants, inasmuch as the binding character of the deed may be disputed, and the accounts have to be taken over again.

Mr. *W. W. Barry*, for Mr. and Mrs. *Dennison*.

Mr. *Giffard*, in reply:—

The deed did not profess to deliver over everything which might be in the hands of the *Curtises*, and the execution was a mere admission that there was a balance of £1268 in the hands of *G.* and *G. Curtis*, not that the account was correct.

The case of *Vernon* v. *Curtis* shews that *plenè administravit* may be pleaded at law; but here there were receipts and payments, and if the Defendants had merely paid the balance over, they were in no better position than ordinary executors; and if the administratrix afterwards chose to say they were her agents, was that statement to bind the *cestuis que trust?*

[The VICE-CHANCELLOR:—Does not your argument go the length of contending that every shopman employed by the widow of a trader before administration to sell the goods of her deceased husband over the counter is an executor *de son tort?*]

Unquestionably it does; but he suffers no hardship; he has only to keep a faithful account.

In this instance the settlement was with one only of the two administratrixes. It had been said that the suit was defective in not making the representative of *Ann Hill* a party; but her next of kin were parties, and there had been no administration to her estate. It was impossible that Messrs. *Curtis* could be sued again, inasmuch as all parties interested would be bound by the proceedings in Chambers.

Nov. 24. SIR W. PAGE WOOD, V.C., after stating the facts, and commenting on the evidence, expressed his opinion that the charges against the Defendants *Curtis* were unfounded, and continued:—

Upon that state of facts I should have felt no difficulty, but for

the case of *Carmichael* v. *Carmichael* (1), which has been referred to. I have recently examined all the cases upon this old branch of the law, and there are one or two points which I think may be treated as clear. It seems to me quite clear at law, that a person who becomes executor *de son tort*, cannot possibly deliver himself from the consequences of that act—cannot free himself from an action, unless he has previously handed or paid over the property. If he have done that previously to the action being brought, he is free from all liability. Consistent with that was the decision in the case of *Paull* v. *Simpson* (2), for the citation of which I am indebted to Mr. *Casson*. That case, as may be expected, is only in conformity with the old law as stated in *Godolphin* (3), and in Mr. Justice *Williams'* book (4). It has been settled by that decision in the Queen's Bench, that if one person possesses himself of the property of a testator and hands over that property to a second person, the latter is not an executor *de son tort*. I mention that with reference to the handing over of the property to Mr. *Curtis* the elder. In this Court such a person might be followed as holding trust moneys with knowledge of the trust, but an executor *de son tort* he is not.

Then is there any difference with respect to an account being settled? *Primâ facie*, and in the absence of authority, I cannot anticipate that there would be any difference. In *Padget* v. *Priest* (5), which was a very hard case, and in *Curtis* v. *Vernon*, the only point decided was, "You cannot get your discharge from the right executor, unless you get it before action brought." Looking at the reason of the thing, that decision appears reasonable and just. How is a man, who has improperly got the property of a testator into his hands, to purge himself, except by putting it into the hands of the person who has a right to it? And if that be so, on what principle can it be said that, because there are matters of account, a suit must be brought in order to settle them? I confess I cannot see why. Then it is said, that Lord *Cottenham* has decided otherwise in the case of *Carmichael* v. *Carmichael* (6). But the remarks of Lord *Cottenham* were not requisite for the decision of

(1) 2 Ph. 101.
(2) 9 Q. B. 365.
(3) Pt. 2, C. 8, sec. 1.
(4) 1 Wms. Exs., 4th ed. 216 (*e*)
(5) 8 T. R. 97.
(6) 2 Ph. 101.

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the case; it was a *dictum*, and is in these terms (p. 103):— "How can you distinguish this case from one in which there are two executors, and one dies, and his representative accounts for his receipts with the survivor? That does not discharge him from the liability to account in a suit for the administration of the estate; and the authorities shew that an executor *de son tort* cannot say he is so as against those who charge him as executor. He has all the liabilities, but none of the privileges that belong to that character." Now I have considered that *dictum* with the respect that is due to so high an authority, and I confess I cannot follow the reasoning by which his Lordship arrived at that conclusion. It is plain that an executor cannot discharge himself by accounting to his co-executor, because he is himself authorized, and it is his duty, to see how the assets are applied. When he has paid over the assets he is not discharged, he must see to their application. If he is so foolish as to part with possession of the assets to his co-executor, though he is not answerable for his co-executor's receipts, he is responsible for what he so pays over. But it may well be asked, what right have you to proceed against a man who has had wrongful possession of property, if he have discharged his duty by making it over to the executor? What claim have you to say, "You shall not be discharged by the rightful owner, but we will unrip all you have done, and bring a suit against you in respect of this property"? That is not the rule at law, it is clear, for an executor *de son tort* who pays over what he has received to the rightful owner before action brought, is at once discharged. And, I apprehend, the rule here must be same. If you treat *Curtis* only as an agent of the administratrix, there is no reason why that property which he receives should not be dealt with as property received on account. Mr. *Giffard* pointed out that the Defendant *Curtis* was charged with never having accounted, and the charge was not denied, but it would be impossible for me on such pleadings as these, where the bill makes no charges of assets remaining in his hands, to treat him as not having accounted. I may further observe, that in the case of *Carmichael* v. *Carmichael*, the appeal was from a decree made in the year 1834, which contained no reference to the *Master* with respect to the settled account, and did not attempt to disturb it in any way. The

Master gave effect to the settled account; exceptions were taken to the report; and the Vice-Chancellor of *England* allowed the exceptions on the ground that the *Master* had no authority to treat the account as settled; and then twelve years after the decree, the appeal was brought on the ground that the decree ought to have contained a direction to the *Master*, not to disturb the account, but to allow the Plaintiff to surcharge and falsify. Lord *Cottenham* said naturally enough, "If your argument is good for anything, it goes to this—that there never ought to have been a decree against you at all, you ought to have been dismissed at the hearing. A direction not to disturb settled accounts may be applicable enough to the case of Plaintiff and Defendant, but not to an account between co-Defendants."

In *Sharland* v. *Mildon* (1), Vice-Chancellor *Wigram* appears to have given a very clear exposition of what the law really is. He says, "The widow of a deceased person—the testator in the cause—intending to obtain representation to her husband, began to collect his assets before she had obtained such representation, and in the course of doing so she employed the Defendant *Hewish* to collect the debts owing to the testator. *Hewish* accordingly received several of the debts, knowing them to belong to the testator's estate, and paid them over to the widow. The widow did not afterwards become the legal representative of the testator, and another party has obtained such representation. The consequence is that the widow might, without question, be sued as executrix *de son tort*. The question is as to *Hewish*. The case in the present instance is one of great hardship on him, and I desired to look into the cases to see if I could avoid treating him as executor *de son tort*. The fact that he would be liable if he had received the money, and had not paid it over, is admitted or well established; and if that be so, it seems to follow, logically, that the Defendant cannot discharge himself, except by paying over to the legal personal representative of the testator the money which he has so received. *Hewish* might have acted in this case purely in a ministerial character, as, for example, a servant might have acted in bringing or removing furniture under the direction of his employer; but the authorities clearly shew that the doctrine—

(1) 5 Ha. 469.

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that the possession of an agent is the possession of a principal—has no application to the case of a wrong-doer."

That brings us to the very case I suggested to Mr. *Giffard*, arising in this way. Suppose a widow, intending to take out administration, employs an assistant to sell goods across the counter, and he does so, and she dies before taking out administration, then they are both executors *de son tort*. It is not a case of agency, but both parties are liable.

There is another strong case, that of *Hooper* v. *Summersett* (1), in which the wife was entitled to administer, and the husband, who was living in the house, carried on the business of the deceased in the same way as in his lifetime. The wife proved the will *after* action brought, and the Court held that this constituted a sufficient intermeddling to charge the husband as executor *de son tort;* and then as to hardship, there was none, for if the husband had pleaded *plenè administravit*, he would not have been liable for more than the assets which he had received.

The older authorities, indeed, all run uniformly in the same direction. In *Kenrick* v. *Burges* (2), the Court agreed that if one enters as executor, of his own wrong, and sells goods and then obtains administration, the sale is good by relation—the wrong is purged; so that, where a person sells a lease and afterwards obtains administration, the title goes back by relation. The only test is, whether or not the wrong has been purged.

Then what have we here? The case of *Sharland* v. *Mildon* shews that if, before administration is taken out, an agent is employed, the agency is not lawful so long as the employer is wrong-doer. But if the employer becomes administratrix, then all she has done is made right, and all that her agent has done is made right also.

The case of *Foster* v. *Bates* (3), which is a very strong instance, shews that, if a person, without instructions, acting on behalf of the representative, whoever he may be, enters into a contract for the benefit of an intestate's estate, and that contract is afterwards ratified by the administrator, the ratification relates back, and is equivalent to a prior authority. Thus, in the absence of fraud, I

(1) Wightw. 16. (2) Moo. 126, *n.* 273.
(3) 12 M. & W. 226.

have no doubt that the administratrix in this case might adopt the acts of the agent, and that her subsequent rightful appointment would give legal validity to the agency.

The only manner in which relief could be had against the elder *Curtis* would probably be, to file a bill charging him with having taken possession of trust property, with knowledge of the trust, and seeking to follow that property in his hands. But that is not the case made by this bill, which is one of an executor *de son tort*. *George Curtis* the elder might be held to be a constructive trustee if he was found in possession of the property with knowledge of the trust; but the case of acting as executor *de son tort*, when brought against him, is met by the case of *Paull* v. *Simpson*, in the Queen's Bench, which determines that he is not chargeable as executor *de son tort* for goods which are handed over to him by another person acting in that character.

With respect to the costs, I should have felt disposed to dismiss the bill without costs, as against the two Messrs. *Curtis*, if the case had stood as it appeared upon the bill and answers, and for this reason, that they acted with great indiscretion in permitting the fund to be mixed with their own, and then in drawing upon the common fund. At the same time I believe that the estate has been considerably benefited by their interference—that there has been a saving of debts—and that the family were maintained whilst they acted. Everything, indeed, that could be done, appears to have been done for the benefit of the family; and there would have been no probability of these children getting a sixpence out of the suit if it had continued, for it is quite clear that the *Curtises* could have claimed the whole of their debt, which would have exhausted the fund. As it is, one member of the family is in possession of one of the farms, and another of the other. But when I consider the absolutely monstrous charges that have been brought against these gentlemen, who have been guilty only of the single indiscretion of placing the trust-moneys and their own into one common fund, and who have acted throughout with uniform kindness to the family, I cannot, in common justice, dismiss the bill otherwise than with costs against the two Messrs. *Curtis*.

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1865

Nov. 4, 21,
Dec. 18.

BERKHAMPSTEAD SCHOOL CASE.

Charity — "Grammar" School—Scheme — Gift with Conditions — Free School—Gratuitous Education.

A school having been founded by letters patent in the town of *B.*, and afterwards incorporated by statute, for "the teaching of children in grammar freely, without any exaction or request of money, not exceeding the number of 144":—

2 CL 499

Held, that instruction in Latin and Greek was made imperative by the terms of the foundation.

The average number of scholars presenting themselves from the town of *B.* and its neighbourhood having never exceeded 50, the Court refused to adopt a proposal for increasing the number of scholars by throwing the school open to the whole world, and establishing dames' houses in the town, and sanctioned a scheme for enlarging the school by allowing the head-master to take boarders.

An offer of a grant of money to an endowed school, accompanied by conditions that exhibitions to the university of like amount to the interest of the grant should be maintained out of the school revenues, and the capital of the grant applied in restoration and enlargement of the masters' houses, was accepted by the Court.

A scheme having been settled in 1857, providing that £5 a year should be paid to the masters for each foundation boy out of the school revenues, so far as they would extend, and when they failed, then by the parents of such foundation boy; and that £9 a year should be paid by the parents of each boy not on the foundation;

The Court varied the scheme by directing that a fee of £3 3*s.* a year should be paid for each foundation boy, to the number of 50, out of the school revenues, and that 144 foundation scholars should be elected, with preference to town boys, for whom capitation fees were to be paid out of the revenues of the school, so far as the income would extend, but that no town boy should pay more than £3 3*s.* as a capitation fee.

THIS Petition was presented by the master and usher of the *Free Grammar School of King Edward VI.*, in the parish of *Berkhampstead*, praying that a scheme for the regulation and management of the school, which was approved and confirmed in the year 1857, might be amended, and a new modified scheme for the regulation and application of the estates and revenues of the school and charity settled under the direction of the Court.

From the Petition and affidavit of the Petitioners it appeared that King *Henry VIII.*, by his letters patent, dated the 14th of

October, 1541, granted to *John Incent*, Dean of *St. Paul's, London*, his royal licence to erect and found a perpetual chauntry within the parish church of *Berkhampstead*, and also a free school within the town.

John Incent, by deed, dated the 23rd of March, in the 36th of King *Henry VIII.*, pursuant to the above letters patent, named a master and usher of the school, and a chaplain of the chauntry, and granted to them and their successors for ever certain lands and hereditaments in *Berkhampstead*, and other places, of the value of £40 per annum.

By an Act of Parliament passed in the 2nd and 3rd years of King *Edward VI.*, intituled "An Act for the foundation of a school at *Berkhampstead*, in the county of *Hertford*," reciting the above-mentioned letters patent and grant, and that forasmuch as King *Edward* was informed that the said foundation of the said free grammar school and chauntry was not duly according to the laws of the realm, nor the schoolmaster, usher, and chaplain, perfectly incorporated, the King granted and founded in *Berkhampstead* one free school for the instruction of children in grammar to the number of 144, and instituted the persons in the Act named to be chief master and usher of the school during the King's pleasure for teaching the children to the number aforesaid, freely, without taking any stipend for teaching them; and that the said free school should thenceforth be called the Free School of King *Edward VI.*, in *Berkhampstead*, and the master and usher, and their successors, masters, and ushers, were incorporated with a common seal. It was also enacted, that the master and usher should hold to them and their successors the land given by the deed of 23rd of March, 36 Henry 8, and that of the revenues of the charity, £17 6*s.* 8*d.* should be paid to the master, £8 13*s.* 4*d.* to the usher, and the residue over and above such yearly stipends be bestowed in and about the relief and help of the poor people of *Berkhampstead*, and the reparation of the school-house, and of the lands and premises appointed for the stipend of the master and usher, and the other uses in the Act after mentioned. It was by the Act also enacted that the King should appoint the master, and the master appoint the usher, and that the warden of *All Souls College, Oxford*, should every third year visit the school

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and master and usher, with power to remove such master and usher.

In the year 1841, by an order of the Court, a new scheme was approved, and certain persons appointed governors of the school, together with the master and usher for the time being.

By an order made on the 1st of April, 1857, a new scheme was established, which at present regulated the management of the school. By this last scheme it was, among other things, provided that the regulation and management of the estates of the charity should continue to be vested in eleven governors, of whom the master and usher should be two.

Clause 5 provided that the annual income of the charity should be expended, first, in the payment of £250 as a retiring allowance to a former master (who had now recently died); secondly, in the repairs and management of the school-house and estate belonging to the charity; thirdly, in payment (in lieu of the moneys formerly applied in the relief of the poor) of the annual sum of £50, or not exceeding one-sixteenth part of the net income of the charity, towards the maintenance of an infant or elementary school for the teaching of male and female children of the poor of the town of *Berkhampstead*, in such matters as the governors should direct; fourthly, in paying (after the determination of the retiring allowance aforesaid) £200 to the master yearly, and £100 to the usher, and, in addition to such salaries, as many yearly sums of £5 each as should be equal to the number of foundation scholars in the proportion of two-thirds to the master and one-third to the usher.

Clause 6 provided that the children in respect of whom such payments should be made, should have the benefit of the school gratuitously, and be free scholars therein; and it was provided that during such time (when it should happen) as the income of the charity should be insufficient to provide such annual sums, that there should be paid to the governors by the friends of every foundation scholar, the yearly sum of £5, and in respect of every scholar not being a foundation scholar, £9 yearly, such payments by the foundation and other scholars to be paid over to the master and usher in the respective proportions of two-thirds and one-third. Power was

given to the visitor or the governors (exclusive of the master and usher) with the sanction of the visitor, to regulate the amounts to be paid to the master and usher from the charity, and the foundation and other scholars, so that the sums paid in respect of the foundation scholars should not be raised above £5 each. Provision was also made for the expenditure of not exceeding £250 towards providing instruction in English literature, history, geography, writing, mathematics, the French and German languages, and such other branches of education, in such manner as the visitor or the governors (other than the master and usher) should with his sanction direct. The scheme also provided (clause 9), that any surplus income should be carried to a reserved fund for repairs, building, rebuilding, or improvements to be effected on the charity estates; (clause 10), that when the reserved fund amounted to £1000, or so long as not less than £100 per annum, or such sum as should be enough to make the value of the reserved fund equal to £1000, was carried to such fund, the surplus income might be applied in the establishment or maintenance of exhibitions, for the regulation of which provision was made by the scheme. The scheme provided also (clause 15) for the election of 144 foundation scholars (first from children of residents, and then from strangers) who were to be between the ages of seven and fourteen years, and not (except with special leave) to remain in the school after attaining nineteen. It was also provided (clause 23) that the master and usher should respectively inhabit the two dwelling-houses adjoining the school-house, without paying rent or taxes, and should be at liberty with the consent, and subject to the regulations, as well as to number as otherwise, to be from time to time made by the visitor, or by the governors (exclusive of the master and usher), with the sanction of the visitor, to take the children into their houses as boarders, and to educate them in the school and to receive payment in respect of such board and lodging; the parents or guardians of such boys paying to the governors for education the sums before provided.

The present gross income of the charity amounted to £1286 16*s.*, and the Petitioners suggested that the value of the school property might increase in a few years.

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The present expenditure was stated in round numbers to be as follows:—

Tuition	£450
Parochial School	50
Average of Repairs, Rates, Salaries, &c. .	150
The Fifty Foundation Scholars at £5 per head rate	250
	£900

The Petition proceeded to state that notwithstanding the repeated efforts made to improve the school, there were now only sixty-one boys—namely, thirty-six day boys, and twenty-five boarders; and that "the existing scheme might therefore be considered to have failed, and the only prospect of increasing the reputation and utility of the school was by introducing considerable modifications into it."

The Earl of *Brownlow* (one of the governors) had signified his willingness to give £4000 sterling for the purpose of endowing two exhibitions of £60 a-year, on certain conditions which he had suggested.

The Petition stated that that gift would of itself necessitate some modification of the existing scheme, and that it was calculated greatly to facilitate those improvements in the character of the school which the Petitioners and the other governors thought desirable; further, that the houses of the master and usher were extremely deficient in accommodation, and that this circumstance checked any increase in the number of boarders, in which direction alone (as experience shewed) the school was capable of, or was at any rate likely to receive, material increase. It was intended, if the proposed modifications in the existing scheme were approved by the Court, to spend, with the sanction and under the superintendance of the Charity Commissioners, such a sum as might be required for enlarging the school premises and adapting the houses of the master and usher for the reception of a greatly increased number of boarders; and "it was intended to apply for this purpose, with Earl *Brownlow's* consent, the £4000 given by him for founding exhibitions."

The proposed supplemental scheme was set out in the Peti-

tion, and the material alterations from that in force were as follows:—

(A.) Provision was made for repaying by annual instalments money to be borrowed for improving, enlarging, and rebuilding the school buildings.

(B.) The head-master and usher, who, under the existing scheme, were to receive from the endowment the fixed annual stipends of £200 and £100 respectively, were, under the proposed amendments, to receive from the same source such fixed annual salaries, being not less than £200 and £100 respectively, as the governors other than the master and usher, with the consent of the visitor, should from time to time direct and appoint. The head-master was to receive two-thirds and the usher one-third of the capitation fees payable by the scholars; and the head-master was to receive two-thirds of £5, and the present usher one-third of £5, from the rents of the estates in respect of every foundation scholar appointed previously to the establishment of that scheme.

(D.) The school was to be open to all boys not less than eight nor more than fifteen years old, who could read and write, and were acquainted with the first four rules of arithmetic, on payment to the governors in advance in each term of such capitation fee in respect of all instruction (other than classical and religious instruction) as the governors, with the consent of the visitor, should from time to time require and approve; provided that boys whose parents or guardians should be resident in *Berkhampstead* or *Northchurch* (such boys being qualified as before mentioned) should be entitled to be admitted to and attend the school on payment of a fee of £3 3*s.* annually. Provided also, that no capitation fee should be required from boys who were free foundation scholars prior to the establishment of the supplemental scheme.

(E.) No boy lodging in any house in *Berkhampstead*, or in the neighbourhood, not being the house of his parents, or of persons *in loco parentis*, was to be admitted to the school unless such house should be approved by the governors.

(F.) In consideration of the £4000 to be paid by Lord *Brownlow*, the governors were to establish and maintain in perpetuity, out of the charity estates, two exhibitions of £60 a-year each. They were also to be at liberty to establish any more exhibitions, not

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exceeding £60 each, which the funds of the charity might at any time enable them to establish; such exhibitions to be tenable by boys educated at the school and proceeding to *Oxford, Cambridge,* or *Durham,* or to any other university, college, hospital, or institution approved by the visitor. The last-mentioned provision was proposed to be in substitution for clause 10 of the existing scheme, which latter it was proposed should be abrogated.

(G.) The governors, when in their opinion the funds should be sufficient, were to be at liberty, with the approbation of the Charity Commissioners, to establish one or more scholarships, tenable at the school by boys, subject to such rules as the governors, with the sanction of the visitor, might prescribe.

(H.) Power was to be given to the visitor, on the application of the governors, to appoint examiners, and to pay them such sum as the governors should think fit.

(J.) Except so far as the existing scheme might be varied by the provisions of the supplemental scheme, the existing scheme was to continue in full force.

The result, so far as capitation fees or payments of head-money to the master were concerned, appeared to be that, in respect of all boys, £5 per boy should be paid out of the endowment, and in addition, for boys from the town, £3 3*s.* per annum by their parents, which sum of £3 3*s.* might, as to boys strangers to the town, be increased at the discretion of the governors and visitor without limit; but that, as to boys who were free foundation scholars prior to the establishment of the supplemental scheme, no capitation fee should be taken.

The Petition stated that a copy of the proposed scheme was, in pursuance of the recommendation of the Charity Commissioners, deposited in the town-hall in *Berkhampstead,* in order that the inhabitants of the town might be able to consider it. Several meetings of the inhabitants were held to consider it, and at the last of the meetings, held on the 10th of January, 1864, a resolution was passed that no scheme would be satisfactory to the inhabitants which did not provide sufficient funds for the free education of 144 boys before applying any portion of the funds of the charity to any other purpose.

The Petition further stated that the Charity Commissioners had

granted their certificate, authorizing the Petitioners, with the concurrence of the other governors, to apply for an order establishing a new scheme, altering and amending the existing scheme, and for any further or other order or relief properly incidental to the application; and that the governors other than the Petitioners fully concurred in the application.

A memorial in opposition to the scheme, dated the 20th of February, 1865, had been presented to the Charity Commissioners by two inhabitants of *Berkhampstead*—*Alfred Healey* and *Alfred Compigné*—and this memorial was further confirmed by the signatures of 131 other inhabitants of the town.

The memorialists called attention to the object of the foundation of the school as stated in the letters patent of King *Henry VIII.*, which was "the teaching of children in grammar, freely, without any exaction in regard of money for the teaching of the same children, not exceeding the number of 144."

They also stated that in the interval between 1841 and 1857, with the consent of the then master, Mr. *Willcocks*, and under his sanction, a suitable house was taken by a Mrs. *Hawkins* for the reception of boarders, at a moderate rate of payment. This house was soon filled, and boarders attended the school to the number of twenty, until Mr. *Willcocks*, having succeeded to an estate elsewhere, resigned his office, and another master was appointed. The boarding-house was discouraged, and soon closed; Mrs. *Hawkins* left the town, and the boarders were lost to the school.

They submitted that the so-called supplemental scheme was one that would override the letters patent of King *Henry VIII.*, the governing statute of King *Edward VI.*, and the orders in Chancery; for that the object of the statute and orders was to carry into effect the original and apparently chief object of the donor and royal founder, namely, the teaching of children "in grammar," or, since the decree in 1841, the teaching of children "as well in grammar as in other branches of education, sanctioned by the visitor," and free of expense; and not to provide for the master and usher by allotting the greater portion of the rents and profits for their benefit; whereas the supplemental scheme, after the present foundation list was exhausted, utterly rejected all free scholars, even from instruction in Latin and Greek, and directed

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that the inhabitants should pay in respect of every child the sum of £3 at least, or any other sum the governors might impose, with the certainty that such child would be regarded by the master and usher, as the boarders were at Mrs. *Hawkins's*, in the light of an incumbrance. They contended that the scheme allotted the rents and profits entirely for the benefit of the master and usher; for, having first excluded all free scholars in future, it gave to the master, in addition to the school and school buildings, a stipend of £200 a-year, and to the usher £100 a-year, or such larger sum as the governors might choose, provided for their retiring salaries, for under-masters to the extent of £150, gave £120 annually for two exhibitions, and then proposed to borrow £4000 (if necessary) to build boarding-houses for seventy boarders, thus enriching the master and usher out of the funds of the charity.

They further expressed their convictions that the town and neighbourhood would supply 144 scholars, if proper encouragement were given to pupils by the introduction of boarding-houses, and by the removal of the necessity imposed upon scholars of learning Latin and Greek; and opposed the expenditure of the funds to build houses, the foundation of exhibitions, and the granting of borrowing powers. They pointed out that the governors had the power of raising the salaries of the master and usher, if the revenues of the charity permitted; and they thought this mode of direct remuneration better than the erection of buildings for private boarding-schools.

Mr. *Amphlett*, Q.C., and Mr. *Wickens*, supported the prayer of the Petition.

Mr. *W. M. James*, Q.C., and Mr. *Freeling*, opposed on behalf of Messrs. *Healey* and *Compigné*.

Mr. *Daniel*, Q.C., and Mr. *Melville*, for other parties in the same interest.

Mr. *T. H. Terrell* said that the supplemental scheme had met with the full sanction and approbation of the Attorney-General, for whom he appeared.

Nov. 21. Sir W. Page Wood, V.C.:—

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The questions that arise upon this scheme relate to the better regulation of the school at *Berkhampstead*. The school was originally founded in the time of King *Edward VI.*, and the foundation deed originally provided for a grammar school, with one master and one usher, for teaching 144 children in grammar, at *Berkhampstead*. It was found that the school had failed in answering the purposes which one may deem the founder to have originally had in view, especially with regard to the number of scholars, there never having been anything like the number of 144 requiring admission into the school. The consequence was that first an attempt was made in 1841, and afterwards a series of attempts were made up to 1855, for the purpose of giving more life to the school by making some change in the arrangement and management of the establishment.

Among other things, the scheme of 1855 (which was confirmed in 1857) provided that, inasmuch as, apparently, the revenues were not sufficient for making an effective school—such as, I may safely assume, was supposed by the Court to have been the intention of the founder to establish—two or three things should be done, which might, it was supposed, have some effect in advancing the interests of the school.

In the first place, the property had been vested originally in the master and usher as a *quasi* corporation. There appears to have been a set of governors established, and instead of this scheme of vesting the property entirely in the master and usher, a retiring allowance was given to the then master, under whom the school seems to have greatly languished. It was then considered that the revenues of the school might be employed in paying a capitation fee to the master—the scholars being free—so as to make his salary dependent, in a great degree, on the number of boys who might be in the school. That was, no doubt, one mode of inducing the master to use his utmost efforts to secure a larger attendance. Accordingly, the 5th clause of the scheme provided, with regard to the rents and profits, as follows: That after deducting the quit rents, the revenues should so far as the same would extend, be applied in manner following—first, in payment of the

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retiring pension (which I may observe was a matter not provided for by the deed); secondly, for keeping in repair the school-house and the buildings and appurtenances connected therewith, and in payment of all the costs, charges, and expenses of, or incident to, the management, repairs, and maintenance of the estate and premises belonging to the school; thirdly, in payment in lieu and satisfaction of the moneys formerly to be paid and applied in and about the relief of the poor people of the town of *Berkhampstead* of the yearly sum of £50 (that being one of the trusts of the residuary property in the original deed), or such larger sum as the governors should think fit, not exceeding one-sixteenth part of the net income of the estates during the year last aforesaid. That scale was fixed on a view of the income of the property when the foundation first took place, and of the relative proportion which it was supposed the town of *Berkhampstead* would be entitled to, if an apportionment of the income were made as it then stood; and the fund was appropriated to the maintenance of an infant or elementary school, which has been established. Then, fourthly, to pay to the master of the school for the time being a salary of £150 during the continuance of the retiring annuity, and to the usher £75 a-year; and when the annuity to the retiring master ceased, the salaries were to be increased to £200 and £100 respectively. Then comes the provision as to paying the capitation fee. As many yearly sums of £5 each as should be equal to the number of foundation scholars were to be paid, in the proportion of two-thirds to the master, and one-third to the usher, together with their respective salaries. The children who were thus paid for were to have the benefit of the school gratuitously, and were to be free scholars therein; but "in case the income of the school" (and this is a very important provision) "should not be sufficient to admit of the payment of as many additional sums as should be equal to the full number of the foundation scholars in the school, namely, 144, then there should be paid in manner aforesaid as many of such sums as the income would suffice to pay, and such payments should be applied in respect of the foundation scholars according to the priority of their respective admissions as foundation scholars into the school; and during such time as the income should be insufficient to provide such annual sums in respect of

all the foundation scholars, there should be paid to the governors by the friends of every foundation scholar, in respect of the increased benefit to be afforded him in the school, the like yearly sum of £5, by equal half-yearly payments."

So that, in truth, that scheme departed from the original scheme of gratuitous instruction to this extent. It was said, We must first get rid of the inefficient master by pensioning him off; then, in order to make effective the salary for competent masters, it is provided that £5 should be paid for every boy on the foundation —nothing like the number of 144 had presented themselves— leaving a considerable number of boys subject to the payment of the capitation fee of £5. So far it seems to have departed from the scheme of gratuitous education, because it took out of that fund which might be applied in paying capitation fees, in the first place, the salary of the retiring master; and in the next place, such sums as were thought by the Court competent to secure efficient masters; and out of those enlarged salaries to the master and usher it would be necessary that deductions should be made in respect of the 144 scholars, if any such number presented themselves. In point of fact, payment had never been made for that number. It had been made for somewhere upon the average of fifty scholars, amounting altogether to £250; leaving, therefore, ninety scholars of the 144, who would have had to pay this £5 each, if they had presented themselves.

Then, after having provided for these matters, it says, "For providing such instruction for the scholars in the said school as after mentioned, the governors shall from and after the 1st of April, 1856, out of the yearly rents, issues, and profits of the estates of the said school and charity, pay to the master and usher such sum and sums of money, if any, as the visitor of the school, or the governors, other than the master and usher, with the sanction of the visitor, shall direct, not exceeding the sums hereinafter mentioned—that is to say, whenever the number of foundation scholars in the school shall be less than forty-one, not exceeding the yearly sum of £100; when the number of such scholars shall be more than forty, and less than seventy-one," so much; and so it goes on, giving a scale according to the number of foundation scholars that might possibly be admitted, up to

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seventy, which I suppose it was then considered likely to be the highest number of those 144, who, abstractedly considered, would have had the right to present themselves. Then there was to be instruction provided in "English literature, history, geography, writing, mathematics, the French and German languages," and so on.

This being the scheme, (I need not go through the other parts of it), I will mention simply this, that exhibitions were contemplated in the scheme of 1855, whenever the funds should allow; and this seems to have been a matter in the contemplation of the visitor originally. Then the governors, by the 15th clause, were to elect 144 foundation scholars, the children of persons being at the time of such election resident inhabitants of the town of *Berkhampstead*, or persons who, if then deceased, should have been resident inhabitants of the town; in the first instance; and in default of them, then the children of any persons throughout the *United Kingdom;* and the number was to be made up to 144. Then there was a provision for the payment of a fee to the examiners, and other small matters. I should mention also that boarders were allowed by the scheme to be taken by the master in the house appropriated to the master, and by the usher in the house appropriated to the usher.

Now that which has occasioned this supplemental scheme to be brought forward is, that in the first place, the master who had the retiring allowance of £250 a-year, has recently died, and that has brought in an additional income of £250 a-year to the school. It further appears that notwithstanding all the efforts which are said to have been used from time to time to improve the school (and this, I think, is fully made out by the affidavits), the number of boys in course of education is comparatively small, there being at present only sixty-one boys at the school, of whom thirty-six are day boys, and the remaining twenty-five are boarders, and that is about the average of the last few years. There are only thirty-six boys, therefore, who have come into the school as persons resident in the town of *Berkhampstead* or the neighbourhood. There are boarders in the town as well; but not children whose parents, or those who stand *in loco parentis* to them, are inhabiting *Berkhampstead*. It cannot be

said, therefore, certainly, that this school has attained to any such state as that which the founder himself intended; and as to getting anything like 144 boys to take advantage of this free education, it appears that at the utmost now there are only sixty.

In this emergency Lord *Brownlow* has offered a munificent gift to the school of £4000; but he offers it on this condition, that exhibitions be provided with this £4000, which, taken at £3 per cent. would produce about £120 a-year; and he also stipulates that, in that case, the school itself shall provide £120 a-year out of its funds for the purpose of exhibitions. On that part of the case I should not have the slightest doubt. The original scheme of 1855 contemplates exhibitions, if the funds should be sufficient; but here is a great improvement offered to the school by this donation of £4000 towards the permanent increase of its funds, which is to be for the permanent benefit of the school, if exhibitions are provided of the like amount. That is an offer which it appears to me impossible for the Court to decline.

The remaining questions are these:—It is proposed by the governors that the master's house and the usher's house should be improved, so that there should be a greater accommodation for boys; and it is proposed to apply the whole of this £4000 in such improvements; and then, for the future, it is proposed that there should not be any foundation boys, properly so called (that is to say, boys paying nothing, and admitted gratuitously to their education), but that hereafter all alike should pay three guineas—that is to say, all belonging to the town or to the neighbouring district of *Northchurch*, and that all other scholars should pay such sum as should be fixed by the governors, and which was contemplated to be about nine or ten guineas.

That portion of the supplemental scheme is certainly a large inroad upon the original scheme of the founder of having some boys (he said 144) who should have an entirely gratuitous education. On that part of the case I have felt very considerable difficulty. It is exceedingly probable, I think, that such an alteration would greatly improve the school by making it a good and valuable school, though up to the present time it seems to have been in a state of great abeyance as regards the benefits

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which have been conferred on those who have attended it. Nevertheless, I was glad to find that one gentleman, who takes a view adverse to the views of the governors, says in his affidavit he was himself educated at that school, and that he received such an education as would have fitted him for the university.

Now as regards those who oppose any alteration whatever, they say: "Let 144 free scholars be freely admitted from all parts of the world, and let them be admitted in this way, by being invited by this free education to come and lodge in the town, at dames' houses and the like, under such discipline, or absence of discipline, as prevails in such establishments." But they couple the proposal—as one cannot help seeing very strongly and explicitly throughout the affidavits—with this, that it ought to be something for the benefit of the people of *Berkhampstead*, in the shape of a commercial school, and ought not to be a grammar school at all. That is, as I have observed, a prevalent view in the affidavits; but it is as contrary to the view of this founder as can well be conceived; and when they speak of the astonishment which the founder would have felt at not finding 144 boys being admitted gratuitously, I am quite sure he would be more astonished if he found that those put on this foundation were not to be instructed in the learned languages. As far as that view is put forward, I cannot adopt it for a moment.

Looking to what has actually happened up to the present time, it appears to me to be an abundant compliance with the scheme of the founder to provide as follows. Seeing that, from all time as far as we have any history about it, this school has had nothing like 144 children coming into it gratuitously, and seeing also that the only persons who can come into it, except through the medium of lodging at dames' houses, or at other lodging-houses which may set up at *Berkhampstead*, must be those who are confined to the immediate district (although it is quite true that there is nothing in the original scheme which says the immediate district is to be the district benefited), I think that if abundant provision is made for all those who can come to take the benefit of the school gratuitously from the immediate neighbourhood, the Court would not much regard the interest of the rest of the inhabitants of *England* who might be sending their

children to *Berkhampstead* to lodge in places where they would be under no discipline or charge whatever beyond that of the owner of the house, and so brought to take advantage of the school. I do not think there would be many such persons, nor does experience show that there have been. There is some evidence of a lady having set up an establishment which was discouraged, and which, therefore, is said to have been put an end to; but with all that has been done, even including the boarders and everybody else, we have only sixty children in the school now.

As regards the master's house, I have not the slightest doubt that that is in a state which, if he is to have boarders at all (and that is provided for by the scheme of 1855), requires to be thoroughly reorganized. I cannot read the report of Mr. *Martin*, the Inspector of Charities, and have any doubt that the master is not put on a fair footing as regards the reception of boarders if the house is to remain as it is. The question of how much should be spent is a matter that requires more consideration at Chambers than I can give to it in Court. It is contemplated that he should have some thirty or forty boarders. It appears to me, regard being had to the small funds of this school, there may be a great deal of doubt as to whether the enlargement should be on so large a scale.

On going over the scheme; the conclusion I have come to is, to introduce a number not exceeding fifty (I question if the number will reach so many) of the local children who shall be free. Then to say, if they ever should exceed fifty (to keep that part of the present proposed scheme), that those living in the town shall not pay more than three guineas. Then to let the governors, if they please, elect foundation scholars not exceeding 144; and if in process of time there should be an improvement of the property, let them be provided for. The scheme as I propose to amend it will run thus:—I take up the supplemental scheme at that which is the important part, namely, as to the appropriation of funds. I say they are to be applied—1. "In repairing and keeping in repair the school-house and the buildings." 2. "In payment of the yearly sum of £50 as a fund for the education of the poor." 3. "In payment of the salaries or stipends of the head-

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master and usher, and of the allowance for an assistant-master, and of any retiring pensions granted to any head-master or usher." Then I add to that clause 3 the following words: "including in the salaries a payment of three guineas each in respect of fifty foundation scholars, in the proportion of two guineas to the head-master and one guinea to the usher." They will be paid for out of the funds of the school just as the others, to make them free. Then, 4. "In providing by annual instalments for the repayment of any sum or sums of money," here I say "not exceeding in the whole the sum of £ ," (that must be filled up at Chambers), "which may be borrowed by the governors, with the authority of the Charity Commissioners, for the purpose of improving, enlarging, or rebuilding the school buildings, and in payment of the interest on such principal loan," and so forth as it stands. Then, 5. "In payment of the stipends of the holders of any exhibitions." Then I leave clauses B and C as they stand. Then I bring in, before clause D, clause 15 of the old scheme thus modified: "The governors shall from time to time elect foundation scholars not exceeding 144 in number, to be admitted into the said school, preferring, in the first place, children who shall be residing with parents, or with some one *in loco parentis* at the time of such election, in *Berkhampstead* or *Northchurch*, or partly in one and partly in the other; and in default of such children aforesaid, then the children of parents throughout the *United Kingdom*." That is the provision for the election of scholars not exceeding 144.

Now, in clause D, I proceed in this way:—The proviso, as it at present stands, is a proviso that the *Berkhampstead* and *Northchurch* boys shall not pay more than three guineas, but making them all pay three guineas. That I alter thus: "Provided that foundation scholars, whose parents, or the persons acting *in loco parentis* to whom shall be resident in *Berkhampstead* or *Northchurch*, or partly in one and partly in the other, to the number of fifty such scholars, and according to the date of their admission, shall be admitted to and attend the said school gratuitously; and if there are more than fifty such scholars, then, after the first fifty, at a capitation fee of three guineas annually; provided always that no capitation fee shall be required from boys who are free foundation

scholars"—that is, prior to the establishment of the supplemental scheme.

Clauses E and F will stand as they are. Then clause G will have considerable alteration: "When, in the opinion of the governors, the funds of the charity shall be sufficient" (here I add this), "they shall make provision for the payment of the capitation fee in respect of each foundation scholar over and beyond fifty *Berkhampstead* and *Northchurch* scholars, and without any restriction as to the residence of the parents, or persons acting *in loco parentis* to such scholars" (that is, after all these other exhibitions. I am afraid it may be the Greek Kalends, possibly; but there it is, if the funds should ever increase), "so far as the funds will permit; and thereupon the foundation scholars on whose behalf such payments shall be made, shall be free from any other capitation fee in respect of education at the school" (of course they will pay everything else like any other scholar). "The number of such scholars shall not amount to more than 144." That is what I have inserted. Then, after that, they shall be at liberty to establish one or more scholarships.

Then as to the scholarships at the school, it appeared to me doubtful whether I could provide for them before I had provided for these foundation scholars. £120 a year for exhibitions we have—that is to meet the exhibitions provided for by Lord *Brownlow;* but I confess I doubt whether scholarships should be added. These are scholarships that are to be held at the universities. However that portion of the scheme is in the nature of a free education, and will come after the other.

The alterations, then, that I have made come to this—that I provide for fifty free scholars; and if there should be more than fifty belonging to *Berkhampstead,* I provide for them also. I do not think it necessary to provide for those who shall be residing with dames, and the like, and I retain that provision which says that any boarding or lodging house must be with the approbation of the governors, for it appears to me discipline cannot possibly be maintained in the school unless some such provision be observed. As regards the building, I do not feel disposed to make it quite so large as contemplated. That will be considered at Chambers.

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The scheme will go back to Chambers with these alterations, and the costs of all parties will be allowed.

Dec. 18. The minutes of the decree, so far as it related to the capitation fee for the masters, were settled in the following form:—

"That payment be made out of the funds of the said charity of a capitation fee of £3 3*s.* per annum (in the proportion of £2 2*s.* to the master, and £1 1*s.* to the usher) in respect of foundation scholars, not exceeding fifty in number, remaining with their parents, or with some one *in loco parentis* in *Berkhampstead* or *Northchurch*, in the Petition mentioned, and which boys so paid for shall be admitted gratuitously.

"And let 144 foundation scholars be elected, with preference of their residing at *Berkhampstead* or *Northchurch* aforesaid, with their parents or persons *in loco parentis*, and provision be made out of the income so far as the same, after the above provisions, will allow it, for capitation fees in respect of such foundation scholars.

"And let no foundation scholar residing with his parents or some one *in loco parentis* in *Berkhampstead* or *Northchurch* pay more than £3 3*s.* per annum as a capitation fee."

EDWARDS *v.* MARTIN.

V.-C. S.
1865
Nov. 6.

Policy—Deposit—Bankruptcy—Order and disposition—Notice.

Bankers with whom policies of insurance were deposited by the assured as security gave no notice in writing to the offices, though the secretaries were casually made aware of the fact of the deposit. The assured became bankrupt and died. On bill by the assignees,

Held, that the policies remained in the bankrupt's order and disposition, and that his assignees were entitled to the proceeds, less the premiums paid by the bankers.

THIS was a motion for decree.

John Glenn, in January, 1839, and in April, 1842, effected policies of insurance on his own life, in the *Victoria Life Assurance and Loan Company*, and the *Britannia Life Assurance Company*, for the sums of £500 and £1000 respectively, and he paid the annual premiums of £13 13*s.*, and £21, which became due until the month of November, 1855, when he was, on the 14th of that month, on his own petition, adjudicated bankrupt, and the Plaintiffs were his assignees.

The Defendants were bankers in *Lombard Street*, and with them the policies were, in August, 1851, deposited by *Glenn* to secure a debt which was due from him. The deposit was not accompanied by any deed or memorandum. *Glenn* died in November, 1862, and thereupon the sums secured by the policies became payable. After the bankruptcy the Defendants, had as they alleged, paid, by *Glenn* as their agent, the premiums which accrued due, out of their own moneys. The Plaintiffs alleged that the policies were either in the actual ownership of *Glenn* at the date of his bankruptcy, or if they were then deposited with the Defendants, the policies and the sums secured by them were in the order and disposition, and in the reputed ownership of *Glenn* at that date, and passed to the Plaintiffs as his assignees.

By an order of the Court of Bankruptcy, dated in August

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1863, reciting that at the time when *Glenn* became bankrupt, he had, by the consent and permission of the Defendants, who claimed to be the true owners, in his possession, order, and disposition, the policies and the moneys thereby assured, or the right to recover and receive the same, it was ordered that the policies and the moneys should be sold by the Plaintiffs for the benefit of the creditors. Thereupon an agreement was come to that the first-named Plaintiff and the last-named Defendant should be trustees of the sums of £996 17*s.* 6*d.*, and £515 1*s.*, which were recovered from the companies, in trust to hold them for the benefit of such persons as should be declared entitled thereto; and the Plaintiffs prayed for a declaration that they were so entitled.

No formal notice of the deposit was given by either of the Defendants to the companies, but the Defendant, *Robert Martin*, deposed that his recollection and belief were that at an interview between him, and his solicitor, and *Glenn*, on the 29th of January, 1861, *Glenn* stated that prior to his bankruptcy he had given notice to the companies of the deposit with the Defendants of the policies, and this evidence was confirmed by the Defendants' solicitor. The debt for which the policies were deposited, and which exceeded in amount the moneys secured by them, had never been paid, and the Defendants claimed to be entitled to the sums received under the policies in payment pro tanto of the debt due to them, and, at all events, to be repaid the premiums which they had paid.

The secretaries of the companies deposed, on the part of the Plaintiffs, that it was the practice in the offices of their companies to enter the particulars of all notices of assignments forthwith, after the receipt of them, in books kept specially for that purpose. The secretary of the *Victoria Company* stated that a verbal notice would not be recognised by the company; that if a verbal notice were given, the person giving it would be informed that no attention could be paid to it; that a notice to be recognised, and to be of avail or protection, must be in writing, and would be acknowledged; that a memorandum of any conversation held with, or remark made to, himself or any clerk of the company might or might not be made, as he or the clerk might think

desirable; that previously to the bankruptcy of *Glenn* no notice that his policy had been assigned or deposited with the Defendants appeared in the books, or had been given to, or to any person on behalf of, the company; that up to, and for a long time after the bankruptcy, *Glenn* appeared by the books to be the absolute owner of the policy; and that, in fact, the first notice given to the company, and the first appearing in the books, was a letter from *Glenn* to him, dated the 1st of July, 1859, stating that his policy was held by the Defendants. He recollected, however, having heard *Glenn* mention in conversation long before that date, that the policy was in the hands of his bankers, but he could not remember when such conversation took place, for, as the statement was merely a casual one made in the course of general conversation, he neither paid particular attention to, nor made any memorandum of it in the books. In October, 1854, a bonus on the policy of £22 8*s.* was declared, and *Glenn* applied for and received the amount.

The Secretary of the *Britannia Company* stated that although generally written notices of any assignment, or dealing with a policy, were given, yet if verbal notice only were given, the particulars of it would be entered in the books, but information respecting an assignment of, or dealing with, a policy acquired casually in conversation, would not be so entered; that previously to the bankruptcy of *Glenn*, no notice of his policy having been assigned, or deposited with the Defendants, appeared in the books, and no written notice had been given to, or to any person on behalf, of the company; and that the first notice was a letter from the solicitors of the assignees in March, 1856, giving notice of the bankruptcy. He recollected, however, that previously, on *Glenn* calling, in 1853, to take up a dishonoured cheque which he had given in payment of the premium, he (in reply to a remark that to preserve the policy the premium must be paid at once) said that the policy was in fact held by his bankers. The statement was merely a casual one made in general conversation, and no memorandum of it was made, nor were any particulars of it entered in the books, but he should have entered them, as it would have been his duty to do, if he had regarded such statement as notice of a dealing with the policy.

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Mr. *Bacon*, Q.C., and Mr. *Swanston*, for the Plaintiffs:—

The policies were allowed by the Defendants to remain in the order and disposition of the bankrupt, as no notice was given to the insurance companies of any deposit of them with the Defendants; although they might have, as alleged, advanced the moneys for the payment of the premiums. The assignees had, under the 125th section of the Bankruptcy Act of 1849, obtained an order from the commissioner for the sale and conversion of the policies.

Until a long time after the bankruptcy, *Glenn* appeared to be the owner of the policies, and even if he did state in casual conversation that the policies were in the hands of his bankers, it would not have been sufficient notice to displace the right of the assignees. *In re Hennessy* (1), *Ex parte Carbis* (2), *Ex parte Arkwright* (3).

Mr. *Greene*, Q.C., and Mr. *T. Stevens*, for the Defendants:—

It is for the assignees to prove that the policies which were in the custody of the bankers, were in the order and disposition of the bankrupt. Policies are documents which cannot be in the order and disposition of a bankrupt, nor could they be recovered in an action of trover; *Gibson* v. *Overbury* (4).

The policies not being in the bankrupt's order and disposition, his assignees could not recover them. Notice first applied to the policies, and next to the proceeds of them, but to the policies the assignees never had any right. They could not sell them because they were not in their possession. *Ex parte Stright* (5).

The onus is not on the mortgagees to shew that notice was given, but on the assignees to shew it was not: *Ex parte* and *In re Stevens* (6), *Smith* v. *Smith* (7).

In the conversation with the secretaries there was a conveyance of knowledge which prevented the order and disposition clause in the Act of 1849 applying. *Ex parte Stright*, *Ex parte Bignold* (8).

(1) 1 Con. & Law 559, and 2 Dru. & War. 555.
(2) 4 D. & Ch. 354.
(3) 3 M. D. & De G. 129.
(4) 7 M. & W. 555.
(5) 2 D. & Ch. 315.
(6) 4 D. & Ch. 117.
(7) C. & M. 231.
(8) 3 M. & A. 477.

Knowledge is notice in cases of reputed ownership, *Ex parte Barnett* (1), *Gale* v. *Lewis* (2), and the knowledge by the secretaries of certain facts, especially the knowledge by the Secretary of the *Britannia Company* of a dishonoured cheque, and of the Defendants paying the premiums, which prevented him dealing with *Glenn* as the unencumbered owner of the policy, displaced the right of the assignees. The neglect to make any memorandum or pay attention to the observations made by the bankrupt, did not affect the rights of the Defendants. The information acquired by the secretaries was not casual, but given them in the ordinary course of business. There may be some distinction between the two policies, as the evidence of notice is not so conclusive in the one case as in the other, still it is sufficient to take the policies out of the order and disposition of the bankrupt. The Defendants are under any circumstances entitled to be repaid the premiums paid by them, with interest.

SIR JOHN STUART, V.C. :—

The only question is as regards notice to the insurance companies, and I think the evidence shews that no sufficient notice was given. It is, therefore, plain, upon the authorities, that the right of the assignees to the proceeds of the policies has not been displaced. The Defendants must be repaid the amount of the premiums which they have paid, with interest at £5 per cent., and the costs of all parties must come out of the fund.

(1) De G. 194. (2) 16 Law J. Q.B. 119.

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HOPE *v.* CARNEGIE.

Practice—Substituted Service.

Substituted service ordered on a solicitor who had acted for certain Defendants in transactions connected with the subject matter of the suit; the bill also to be served at the residence of the Defendants abroad, where personal service had been found impracticable.

THIS was a motion for substituted service.

Adrian John Hope, the testator in the cause, a domiciled Englishman, had devised and bequeathed his real and residuary personal estate, in *England* and elsewhere, upon trust for the Plaintiff, his eldest son, an infant, on his attaining his majority, with contingent gifts over to two of testator's daughters, *Emily* and *Henrietta*, and had given legacies of £10,000 each to his said two daughters. The testator died in the month of December, 1863. For many years before his death the testator had been engaged in litigation with his wife both in *England* and *France*, which was still pending at his death. On the 5th of November, 1864, a common decree for the administration of the real and personal estate of the testator was made in a suit of *Hope* v. *Beresford-Hope*, in which the present Plaintiff was Plaintiff, and the executors and trustees of the will were the only Defendants. In this suit a compromise of the litigation with the widow was carried out, with the sanction of the Court, by a deed of the 19th of December, 1864. A large portion of the testator's estate consisted of Austrian, Russian, Dutch, and other stocks and shares, the vouchers of which were in the hands of agents in *Holland* who had managed the property for the testator, and after his death, for the trustees and executors. Other part consisted of real estate in *Holland;* and there was also real estate in *England*, and money in the English funds. After the administration decree, a suit was commenced in *Holland*, by the testator's daughter *Emily*, for the administration of the real property there situate, and the personal property in the hands of the Dutch agents, according to the law of *Holland*.

The present supplemental bill was filed on the 19th of June, 1865, by the Plaintiff against the widow and the remaining children of the testator, and also against the executors and trustees, for the purpose of obtaining a declaration that the testator was domiciled in *England*, and that the property, whether in *Holland* or elsewhere, passed by the will. *Emily Hope* (the Plaintiff in *Holland*) and *Jean Henry Hope*, an infant son of the testator, were residing with the widow in *Paris*, and an order for service out of the jurisdiction upon them and their mother was obtained. Various unsuccessful attempts were made to effect this service, and, on the last of these, the agent employed was seized by the French police, and dismissed, after two days' incarceration, with a warning not to repeat the attempt, the magistrate stating that he had taken the copy-bill to Mrs. *Hope*, who had translated it to him.

Mr. *Malins*, Q.C., and Mr. *Hemming* moved *ex parte* for substituted service upon a Mr. *Grover*, a solicitor, as against the widow and *Emily* and *Jean Henry Hope*.

The facts in evidence in support of the application were as follows:—Mr. *Grover* (with a former partner) had acted as Mrs. *Hope's* solicitor throughout the litigation in the testator's lifetime, and he had also acted for her in arranging and carrying out the compromise between her and the executors. When the present bill was filed he was asked to accept service, and in reply, on the 20th of July, 1865, requested a print of the bill "that he might tell Mrs. *Hope* something about the suit." The print was sent, and, on the 7th of August, *Grover* wrote that he had no authority to appear.

It was also proved that *Grover* had acted for Miss *Emily Hope* in the matter of her legacy. This had been mortgaged by her by a deed to which *Grover* was attesting witness. He also, on her behalf, applied for payment, and approved the draft release to be executed on that occasion. The legacy was paid to Miss *Emily Hope* and her mortgagees in the month of January, 1865, and *Grover* attested the execution of the release.

Upon these facts, with proof that the Defendants, *Emily* and *Jean Henry Hope*, were living with their mother at her house in

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Paris, substituted service on *Grover* was asked for. *Hope* v. *Hope* (1) was referred to.

THE VICE-CHANCELLOR made an order that service upon *Grover*, together with service at the house of Mrs. *Hope* at *Paris*, should be good service on the Defendants, Mrs. *Hope* and her children, *Emily* and *Jean Henry Hope*.

(1) 4 D. M. & G. 328.

RAMSAY *v.* SHELMERDINE.

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1865
Nov. 11, 13.

Will—Class—Revocation—Conversion—Next of Kin.

Gift of residue upon trust to convert and "divide the same into as many equal parts or shares as shall be equal in number to the number of my children living at my decease, or born in due time afterwards, or such of them as may happen to have died in my lifetime, leaving issue; and I give one of such shares to each of my sons who shall attain twenty-five or die in my lifetime, leaving issue, and, on trust, to retain each of my daughters' shares, to be settled to their separate use, the shares of those dying without issue to go to the survivors." By his codicil the testator revoked all and every provision in his will in favour of his daughter *Ellen* or her issue in her own right, or by right of survivorship, or in any other manner whatsoever:—

Held, that the children did not take as a class, and that there was an intestacy as to *Ellen's* share; but that Ellen was not excluded from sharing as one of the next of kin.

There being four children, and the heir having by deed-poll ratified the testator's will, in order to make it effectual as to a certain Scotch estate:—

Held, that the one-fourth share of the Scotch estate was undisposed of, and passed under the will of the heir as part of his personal estate.

EDWARD CONNELL, the elder, by his will dated the 23rd of April, 1846, after giving certain legacies and an annuity to his wife, gave all the residue of his real and personal estate upon trust to convert the real estate, and after payment of his just debts, upon the following trusts:—

"Upon trust to divide the same into as many equal parts or shares as shall be equal in number to the number of my children living at the time of my decease, or born in due time afterwards, or such of them as may happen to have died in my lifetime, leaving lawful issue; and I give and bequeath one of such parts or shares unto each of my sons who shall attain the age of twenty-five years, or the executors or administrators of such of them as shall die, whether in my lifetime or afterwards, under that age, leaving lawful issue; the said parts or shares to be paid to each of my said sons if and when he shall attain the age of twenty-five years, or to the executors or administrators of such of them as may happen to die under that age, and leave lawful issue, with all convenient speed after my decease; and upon further trust that they my said

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trustees do and shall retain each of the shares of my daughters who may be living at the time of my decease of and in the said trust moneys, in order that the same may be invested for the separate use and benefit of each of my said daughters in the manner hereinafter expressed and declared of and concerning such said several shares respectively; and with respect to such of my daughters, if any, as may happen to die in my lifetime, leaving lawful issue, I give and bequeath her or their share or shares of the said trust moneys unto her or their executors or administrators, the same to be paid with all convenient speed after my decease." After certain provisions for maintenance, the will proceeded as follows: "Provided always, that if any of my children being sons shall die under the age of twenty-five years without leaving lawful issue, or being daughters shall die under twenty-one unmarried, then I give and bequeath the part or share, parts or shares of him, her, or them so dying, of and in the before-mentioned trust moneys, and the interest, dividends, and accumulations thereof, to the survivor or survivors of them my said children and the executors or administrators of such of them as may be dead, leaving lawful issue living; such executors or administrators nevertheless to take no greater or other share than his, her, or their testator or intestate would have been entitled to if living."

By a codicil to his will, dated 28th of November, 1846, the testator proceeded thus:—

"I hereby annul, revoke, and absolutely make void all and every bequest and provision in my said will contained in favour of my said daughter *Ellen* or her issue, either in her own right or by benefit of survivorship, or in any other manner whatsoever . . . Now in lieu of the bequest so made in my said will in favour of my said daughter *Ellen*, I hereby give to my trustees the sum of £1584 B stock in the *North Union Railway*." The testator then declared certain trusts of the stock in favour of his daughter *Ellen* and her children, and directed that in case she left no children living at her death the stock should form part of his personal estate. The testator thereby confirmed his will in other respects, and added the following: "In witness whereof, I, the said *E. Connell*, have

to this codicil, which I direct shall be annexed to and taken as part of my said will, set my hand this 28th day of November, 1846."

The testator died the 9th of January, 1851, and had at the date of his will and at his death four children living, viz.: *Edward*, *Ellen*, *Fanny*, and *Margaret*.

At his death the testator was possessed of an estate in *Scotland*, and *Edward Connell*, the younger, being advised that the same did not pass under his father's will, shortly after his father's death, viz., on the 4th of October, 1852, by a deed of that date, according to the forms of the law of *Scotland*, conveyed the estate to trustees upon the trusts, and for the intents and purposes of the said will and codicil of the said *E. Connell*, the elder, heritably and irredeemably, and by the same deed the said *E. Connell*, the younger, ratified his father's will as well as to heritable estates in *Scotland* as to all other estates thereby conveyed. The deed poll recited that he executed this deed out of regard to his father's memory, and in particular, because he had resolved to fulfil his father's intentions and to ratify his will.

Edward Connell, the younger, by the joint operation of his will and codicil gave one-fourth of his estate, including his interest in the *Scotch* estate to one *Jane Evans*, and the other three-fourths to his sister *Ellen*. He died the 30th of November, 1857. The bill was filed to administer the estate of *E. Connell*, the elder, and prayed *inter alia* for a declaration that the deed poll of the 4th of October, 1852, was a valid and binding deed.

There was also pending a suit to administer the son's estate.

There were two questions raised for the decision of the Court; first, whether the share given to *Ellen* by the will and revoked by the codicil went to the other three children, or was undisposed of, and passed as in case of intestacy. Secondly, assuming that such one-fourth share was undisposed of by the will, whether consequently there was not a resulting trust as to the fourth part of the *Scotch* estate for the personal representative of the son.

Mr. *Malins*, Q.C., and Mr. *Bedwell*, for the Plaintiff:—

On the first point, this was a gift to a class, and one share having

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been withdrawn by the codicil from the operation of the will, the property was divisible among the other children, who, in the events that happened, were three.

This case is very nearly identical with the case of *Shaw* v. *M'Mahon* (1), in which Lord *St. Leonards* held on similar words that the share revoked was divisible among the other children. Lord *St. Leonards* adverted to the case of *Creswell* v. *Cheslyn* (2), and expressed his approval of that decision, pointing out that in that case there was a gift to the three children *nominatim* as tenants in common. The case of *Humble* v. *Shore* (3) also illustrates the distinction. It is clear the gift was to a class, and the residue was divisible among all the children of the testator living at his decease, except so far as it had been cut down by the codicil.

On the second point the language of the testator's will put the heir to his election, and the heir elected to take under the will, and by the deed poll brought the *Scotch* real estate within the operation of the testator's will. The proper declaration therefore would be that the whole, including the *Scotch* estate, was divisible in thirds, and that *Ellen* was excluded.

Mr. *Bacon*, Q.C., and Mr. *Karslake*, for parties in the same interest as the Plaintiff:—

The Court always leans against such a construction as leads to an intestacy. Here the gift must be treated as a gift to a class, because there is no *constat* that the number of his children at the date of his will would be the same as at his death. At the date of the will there were four, and they all happened to survive him, but three might have died in his lifetime and the whole interest might have vested in one.

In *Harris* v. *Davis* (4), the Court interpreted nearly similar words both in will and codicil, thus: That the will, as operated on by the codicil, must be read as if the gift was not contained in it, and that, consequently, the revocation enured for the benefit of the other devisees and legatees. It must be observed, too, in the present case, that there was a survivorship clause in the will, which was also taken away, as far as *Ellen* was concerned, by the

(1) 4 Dr. & W. 431.
(2) 2 Ed. 123.
(3) 7 Hare, 247.
(4) 1 Coll. 416.

codicil. The case of *Boulcott* v. *Boulcott* (1) proved the rule by exception. In that case there was a gift to eight nephews, by name, with a direction in case any of them died without children that the share was to go over. By the codicil the testatrix revoked the trust as to two shares, and it was held that the limitations over of the shares were revoked, and that the shares went to the heir at law and next of kin.

Shaw v. *M'Mahon* (2), taken in conjunction with the case of *Creswell* v. *Cheslyn* (3), defines the law of the Court, and completely governs this case. The authority of the latter case was confirmed by Lord *St. Leonards*, and was not in any degree shaken by Serjeant *Hill's* note (4).

On the question of the Scotch property they took the same view as the Plaintiffs, and submitted that if there was any doubt there must be an inquiry.

Mr. *Greene*, Q.C., and Mr. *J. Pearson*, for parties in the same interest, took the same view as the Plaintiffs.

Mr. *W. M. James*, Q.C., and Mr. *Prendergast*, for the daughter *Ellen*:—

Assuming that there was an intestacy as to *Ellen's* share, it follows that as *Edward Connell*, the younger, only executed the deed poll of the 4th of October, 1852, in order to confirm and ratify his father's will, one-fourth of the Scotch estate, though converted, remained in *Edward Connell*, the younger and passed under his will as personal estate. The purpose of the deed was to pass the legal interest in the Scotch estate so far as was necessary (but only so far), for the purposes of his father's will.

They cited *Ackroyd* v. *Smithson* (5).

Mr. *Craig*, Q.C., and Mr. *Round*, in the same interest.

SIR JOHN STUART, V.C.:—

In the case of *Shaw* v. *M'Mahon* (6), Lord *St. Leonards* pointed

(1) 2 Drew. 25.
(2) 4 Dr. & War. 431.
(3) 2 Ed. 123.
(4) Cited 2 Ed. 125.
(5) 1 Bro. C. C. 503.
(6) 4 Dr. & W. 431.

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out the difference between a gift to persons of aliquot parts of a fund and a gift to persons as a class.

It appears to me that on the true construction of this will the gift is not to a class, but is a gift to each of the testator's children of one-fourth part of the testator's real and personal estate, in separate shares, each child to take a share, which is dealt with by the will as the share of that child. By the codicil the testator takes away one of the shares from one of the persons to whom it had been given it by the will, but does not give it to any other person. The result, therefore, is, that the share taken from *Ellen* remains undisposed of, and must be administered as a share as to which there is an intestacy.

As a general rule, the Court will struggle against an intestacy; but in a case where a share is given by the will, and revoked by a codicil without any words of gift to any other person, the Court must hold that it is undisposed of, and, as to such share, that there is an intestacy.

The testator having taken away by the codicil the gift to *Ellen Halstead*, might have gone on to say, "*Ellen Halstead* is to take no part of my estate," and had he done so there would have been the same perplexing question which this Court had to deal with in the case of *Lett* v. *Randall* (1), in which the question was, how far the words of the testator's will appeared to exclude his widow from any share in the estate beyond the annuity given by the will. There was in that case the same kind of difficulty which came before the House of Lords in *Vachell* v. *Breton* (2), where the testator gave to two of his children "ten shillings each and no more." The testator having used the words "no more," the House of Lords came to the singular conclusion that the addition of these words operated so as to deprive the legatees of any share under an intestacy. In a note to the report of the case of *Lett* v. *Randall* (3), reference is made to the views of Lord *Loughborough*, Sir *W. Grant*, and Lord *Eldon*, on this question. If the testator in this case meant that his daughter *Ellen* was not to take any part of his estate, it would have been easy for him to say so in express terms. But he does not so exclude her.

(1) 3 Sm. & Giff. 83. (2) 5 Bro. P. C. 51.
(3) 3 Sm. & Giff. 83—90.

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Therefore it seems to me that *Ellen Halstead* is not excluded from taking her distributive share under the statute.

The second question is one of great difficulty. The deed of *Edward Connell*, the younger, ratifies the father's will as to the real estate, and for the purposes of that will it has to be sold. Therefore, upon the combined effect of that will, and the deed, will, and codicil of *Edward Connell*, the younger, and having regard to the fact that the assets are Scotch estate, there seems to be enough to justify the Court in declaring that according to the true construction of the will, one-fourth part of the residuary, real and personal, estate of the testator, including the Scotch estate, was undisposed of; and that one-fourth part of the Scotch estate passed under the will of *Edward Connell*, the younger, as part of his personal estate.

MINUTES:—Declare that, according to the true construction of the will and codicil of *Edward Connell*, the elder, one-fourth of the proceeds, from sale and conversion, of his residuary real and personal estate was undisposed of by his will and codicil.

Declare that, having regard to the effect of the deed of the 4th of October, 1852, executed by *Edward Connell*, the younger, and according to the true construction of the wills and codicils of *Edward Connell*, the elder, and *Edward Connell*, the younger, one-fourth part of the Scotch estate was undisposed of by the will and codicil of *Edward Connell*, the elder, and passed by the will and codicil of *Edward Connell*, the younger, as part of his personal estate.

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V.-C. S. 1865 *Nov.* 7.

Specific performance—Conditions of sale—"Outgoings"—Current Rent.

On a sale of leaseholds, the conditions were that the purchaser should have possession on the 14th November, 1864, "all outgoings up to that day being cleared by the vendors."

Held, on a bill by the vendors for specific performance that an apportioned part of the current rent, from the last quarter day to the 14th November, was an outgoing, and must be allowed to the purchaser.

BILL for the specific performance of an agreement. The Plaintiffs were the assignees in Bankruptcy of *William Dean*, who was, on the 23rd day of August, 1864, adjudicated bankrupt on his own petition. The Defendant was the purchaser of two

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lots of leasehold premises comprised in three leases, which the Plaintiffs caused to be put up for sale by auction, subject to certain particulars and conditions of sale.

The first lot comprised premises which were devised to *William Dean*, his executors, administrators, and assigns, for a term of twenty-one years from the 24th of June, 1861, at the yearly rent of £110, payable quarterly.

The other lot comprised premises which were demised to *William Dean*, his executors, &c., from the 25th of December, 1862, for the term of twenty-one years, at the yearly rent of £80; and also premises which were demised to *William Dean*, his executors, &c., from the 24th of June, 1862, for the term of twenty-one years, at the yearly rent of £100.

The particulars and conditions of sale contained the following clause:—"The purchaser shall pay immediately after the sale into the hands of the auctioneer a deposit of £20 per cent. in part of his purchase-money, and sign an agreement for payment of the remainder on the 14th day of November, 1864, at which time the purchase shall be completed, and the purchaser shall then have possession of the property; all outgoings up to the day being cleared by the vendors."

The Defendant became the purchaser of the premises comprised in Lot 1, for the sum of £120, and in Lot 2, for the sum of £20, and he paid deposits of £24 and £4 respectively. But he declined to complete the purchase unless the Plaintiffs' solicitor either allowed him or gave an undertaking to pay half of the current quarter's rent from Michaelmas, which would become due on the 25th of December, 1864, and he insisted that such half quarter's rent was an outgoing which the Plaintiffs under the conditions of sale were bound to allow, and this allowance the Plaintiffs declined to make. The Plaintiffs alleged that the half quarter's rent in respect of the premises comprised in Lot 2 in fact exceeded the purchase-money of £20, agreed to be paid by the Defendant; and that it was never intended, or contemplated, by the particulars or conditions of sale, or by themselves or their solicitors, that any portion of the current half quarter's rent should be paid or allowed by them; and also that the Defendant well knew this when he entered into the contract.

They also alleged that on the 27th of December, 1864, the Plaintiffs' solicitors, in order to save expense, proposed that the question should be submitted to the decision of the Commissioner in the bankruptcy; that they subsequently offered to leave the question to any Queen's Counsel, and that these offers were declined. An assignment of both lots was made by one deed which had been executed by the Plaintiffs previously to the first appointment which had been made for the settlement of the purchase, and it was arranged that the assignment should continue to be held by the Plaintiffs until the settlement of the question and the completion of the purchase of Lot 2. But in January, 1865, the Defendant wrote to say that he begged to decline having anything further to do with the property. At a subsequent interview, in order to avoid litigation, the Plaintiffs' solicitors offered to compromise the matter by allowing half the sum in dispute, but this the Defendant also declined; and in February, 1865, the Plaintiffs' solicitors proposed to submit the question as to the apportionment of rent to this Court on a special case, but this offer was also declined. In consequence of the execution of the assignment, and of the refusal of the Defendant to complete the contract, the Plaintiffs applied to the Commissioner in Bankruptcy and he directed that a suit should be instituted unless the Defendant would abide by the opinion of Counsel to be taken in the matter. On the 23rd of February, 1865, the Defendant wrote, saying he was perfectly prepared to meet any proceedings which might be taken, and he wished it to be distinctly understood that unless the Court decided against him he should positively refuse to take the premises upon any terms. The Plaintiffs prayed that the Defendant might be decreed specifically to perform the agreement for the purchase of the premises comprised in Lots 1 and 2, and that it might be declared that the Defendant was not entitled to any deduction or allowance in respect of the half quarter's rent from the 29th of September to the 14th of November, 1864, or any part thereof.

Mr. *Bacon*, Q.C., and Mr. *Everitt*, for the Plaintiffs:—

Rent is not payable until it has actually accrued, and it is in no sense an outgoing. On the 14th November it was accruing, and

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was not due. The subjects to which the term outgoing applies are various and well known, but it does not apply to current rent. The bill was not filed till the contract was repudiated.

Mr. *Malins*, Q.C., and Mr. *Hardy*, for the Defendant, were called upon only on the question of costs.

If the Defendant should have to complete the contract he ought to be placed in the same situation as if the contest had not been raised. It is not a clear case for specific performance.

SIR JOHN STUART, V.C. :—

I think the Plaintiffs were wrong in the construction which they put upon the terms of the particulars of sale of this property. The bill is one for specific performance, and the question is whether or not the Plaintiffs were bound to clear off a portion of the rent which accrued in respect of this property from the 29th of September to the 14th of November, 1864; and, according to my construction of the contract, the Plaintiffs were clearly so bound.

The Plaintiffs are entitled to a decree for specific performance, subject to a declaration that they must clear off the rent up to the 14th of November, 1864. The only question which remains is as to the costs of the suit. The Plaintiffs having failed in their contest as to their construction of the terms of the contract, the ordinary course would be that they should be ordered to pay the costs of the suit—of a contest in which they have failed. But there are other circumstances which make it unreasonable that they should be ordered to pay the Defendant's costs. In the first place, the Plaintiffs, in order to avoid litigation in reference to a sum of only £18, offered to refer the decision of the question to a Commissioner in Bankruptcy, but that offer was refused. They then offered to refer it to a Queen's Counsel, but that was also refused. They then asked that the question might be decided upon a special case, and that was refused. The Defendant insisted upon having the question submitted to this Court in its present form, but any of the other modes offered by the Plaintiff would have been more suitable in such a case. These refusals must be considered as having a material bearing upon the question as to who shall pay the costs of the suit. But the

matter does not rest there, for the Defendant having resisted all those modes by which he might have obtained a settlement of the question in a short and inexpensive way, stated that he was quite prepared to meet any proceedings which might be instituted, and that he should positively refuse to take the premises upon any terms; and he also said that he was entitled to repudiate the contract altogether. He says now that the premises have been empty and that he has lost the sum of £190 thereby. But he has lost it by his own choice. He might have escaped from that loss by a payment of the sum of £18. Under all these circumstances there must be a decree for specific performance, with the declaration before stated, but without costs.

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V.-C. S. 1865 *Nov.* 15.

Bankruptcy—Composition—Surety—Secret bargain—Costs.

On a bill by a bankrupt, who had compounded with his creditors for eight shillings in the pound, and where bankruptcy had been annulled, the Court set aside, with costs, a secret bargain, whereby the bankrupt agreed to pay one creditor in full, in consideration of his becoming surety for payment of the composition.

THIS bill was filed by the Plaintiff asking for an account "of the dealings and transactions of the Defendant with the Plaintiff since the 18th of January, 1862."

The second paragraph of the prayer which raised the material question between the parties was as follows:—

"2. That it may be declared that the Defendant is not entitled to credit in account with the Plaintiff to any further sum than a composition of eight shillings in the pound in respect of the debt due from the Plaintiff to the Defendant at the time of the Plaintiff's bankruptcy.

"3. That the Defendant may be restrained from selling the unsold goods of the Plaintiff without his consent."

The Plaintiff, prior to January, 1863, carried on business as a woollen manufacturer near Leeds, and in the course of his business had dealings with the Defendant, who carried on business as a

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cloth merchant at Leeds, in partnership with his son, under the style of Messrs. *Barker & Son.*

In December, 1861, one *James Winder* filed a Petition for adjudication of bankruptcy against the Plaintiff under the *Bankruptcy Act*, 1861. *Winder's* debt was alleged to be £470.

The first meeting of the creditors was held on the 23rd of December, 1861. At this meeting the Plaintiff offered his creditors a composition of eight shillings in the pound, to be secured by bills of exchange dated the 23rd of December then instant, and payable in equal amounts at three months and six months respectively, *such bills to be drawn upon the Plaintiff by some person as security, to be approved of by Winder* as such petitioning creditor, all his costs, including the costs of the action by him, and of the bankruptcy, to be paid in full by the Plaintiff.

Three-fourths in number and value of the creditors present or represented at the meeting consented, by resolution, to the proposal, and the Court thereupon stayed the proceedings in bankruptcy till the 20th of January following.

In pursuance of the arrangement an indenture was made, dated the 18th of January, 1862, between the Plaintiff of the one part, and the persons whose names and seals were affixed (being creditors) of the other part, which recited the bankruptcy and the proposal and resolution of creditors, and went on to recite that the Plaintiff, in pursuance of the proposal, had named the Defendant as the person by whom, as such surety, the said bills of exchange should be drawn upon the Plaintiff, of whom *Winder*, as such petitioning creditor, and the other creditors, had approved, as they thereby acknowledged. It was then by the said indenture witnessed that for effectuating the said proposal, and in consideration of bills of exchange for the dividend or composition of eight shillings in the pound upon the debts of the parties thereto of the other part, set opposite to their respective names, they, the said parties thereto of the other part, released the Plaintiff from all demands in law or equity by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of the indenture.

The indenture was duly executed within the period of seven days from the date thereof by three-fourths in number and value of the Plaintiff's creditors, and became binding on all the creditors

under the statute. The bankruptcy was annulled on the 20th of January, 1862. The indenture was filed on the 1st of February, 1862, and protection given on the 6th of the same month.

The seventh paragraph of the bill (omitting immaterial passages) was as follows:—

"The Defendant agreed to become the Plaintiff's surety for due payment of the amount of the composition on the terms that the Plaintiff should deliver to the Defendant large quantities of woollen cloths with certain cashed bills of exchange, and that the Defendant should sell such cloths as agent for, and on behalf of, the Plaintiff, and out of the cash and proceeds of the bills and sale of the cloths pay the bills of exchange given in composition for the creditors (other than the Defendant), and account to the Plaintiff for the proceeds of the sale of all such goods. The Defendant was to sell the goods at prices to be named by the Plaintiff, and to retain for his own benefit as profit any balance he might attain on sale of such goods beyond the Plaintiff's price. And out of the moneys coming to the Plaintiff in respect of such sales the Defendant was to deduct in the first instance any moneys paid by him on the Plaintiff's behalf. *The Defendant further required and insisted on the following condition as part of the terms on which he consented to execute the hereinbefore stated indenture, and to become such surety as aforesaid, viz., that the Plaintiff should pay in full a debt then due from him to the Defendant. The Plaintiff was forced to consent, and consented, to the last-mentioned condition, and accordingly accepted and delivered to the* Defendant two bills of exchange for £88 15*s.*, and £89 2*s.* 6*d.* respectively. The sums secured by these bills of exchange respectively represented the entire debt due to the Defendant. The Plaintiff, however, charges that the said condition was illegal and contrary to the provisions of the *Bankruptcy Act*, 1861, and generally to the law of Bankruptcy, and that the Defendant is not entitled in respect of the debt so as aforesaid due to more than eight shillings in the pound. The condition that the Plaintiff should give to the Defendant such acceptances was imposed on the Plaintiff secretly and in an underhand manner, and without the privity of any of the other creditors of the Plaintiff, and in fraud of such creditors.

"The Plaintiff's creditors, including *Winder*, consented to receive

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such compositon of eight shillings in the pound on their respective debts, and to execute the said indenture on the faith and in the belief that all the Plaintiff's creditors, including the Defendant, were to receive the said composition on their separate debts, and no further or larger sum. And many of such creditors would not have agreed to accept the said composition if they had known, believed, or suspected that a creditor of the Plaintiff to a considerable amount, viz., the Defendant, was to receive the full amount of his debt, and to be preferred to and receive an undue advantage as compared with the Plaintiff's other creditors."

The bill alleged that the Defendant had received £1168 17*s.* 7*d.* on the Plaintiff's account, and that he alleged he had paid all the creditors. The bill then set out certain correspondence, which shewed that the Defendant insisted on being paid his debt in full, and refused to account on any other terms.

The Plaintiff's affidavit was nearly in the terms of the bill. One witness, *John Wade*, a creditor of the Plaintiff, deposed that he refused to sign unless satisfied that the Defendant was to receive the same as the other creditors. That in December, 1861, he received a letter, in which the Defendant stated he was about to receive eight shillings in the pound composition, and no more, the same amount as the Plaintiff's other creditors, and he thereupon assented to the composition.

The substantial defence to the bill was set forth in the 11th paragraph of the answer.

"After the Plaintiff's bankruptcy, and during his negotiations with his creditors to induce them to accept the proposed composition, he applied to several persons to guarantee the amount thereof; but not succeeding with them, he at last applied to me (Defendant), to guarantee it; but I declined to negotiate with him at all until he had obtained the consent of the rest of his creditors to the proposed composition. His solicitor informed me that unless some respectable and responsible person offered himself as surety, the creditors would never accept the composition, and I was at length prevailed upon by the Plaintiff to consent to my name being mentioned by the solicitor to the creditors as a proposed surety. The Plaintiff, subsequently, and after the passing of the resolution in the 3rd paragraph of the bill

mentioned, and after my said firm had agreed to accept the composition of eight shillings in the pound on our said debt of £177 10s., informed me that his other creditors would accept the composition, provided a guarantee could be obtained to the satisfaction of *Winder;* and, thereupon, negotiations with me were renewed by the Plaintiff, and I at length—but not until *after* the said deed of composition had been signed by the Plaintiff's creditors—agreed to guarantee to the rest of such creditors the payment of the said composition; but I did so upon the express understanding and agreement with the Plaintiff, that in consideration of, and as payment for, the risk and trouble I should incur, as such surety, bills to be drawn by my said then firm of *Barker & Son,* and to be accepted by the Plaintiff, should be delivered by him to such firm for the amount of twelve shillings in the pound on our said debt, in addition to the composition of eight shillings in the pound, which my said firm had previously agreed to accept."

In the 16th paragraph he said:—"After the composition was accepted by my said firm, and after the deed of composition was signed by the Plaintiff's creditors, I stipulated with the Plaintiff as the price of my suretyship, that he should secure to my then firm the residue of the debt beyond the composition, and I declined to become his surety unless that condition was complied with."

The answer further alleged that it was at the Plaintiff's request the Defendant consented to become surety. The answer admitted the application for an account. It was also alleged that several of the creditors knew of the arrangement.

Winder, in his affidavit, stated that the Plaintiff had told him that the Defendant had refused to be the guarantor, unless the Plaintiff would pay his debt in full. The Defendant also told him (*Winder*), the same thing, and that he had refused to be surety, unless the creditors generally approved, and unless his firm's debt was paid in full. He (*Winder*) did not disapprove. He (*Winder*) thought that the Defendant had devoted a very great deal of time and attention to the Plaintiff's affairs, and considered that the payment of the debt due to his firm in full was no more than a fair compensation for such risk and trouble.

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It appeared from the deed reciting the Defendant's consent to act as surety, that he was the *second* creditor who had signed.

Mr. *Karslake*, for the Plaintiff, submitted that the secret bargain by which the Defendant secured to himself a greater dividend than the other creditors, was fraudulent and void. He cited *Forsyth* on Composition (1), and the cases there referred to. He was stopped by the Court.

Mr. *Malins*, Q.C., and Mr. *Williamson*, for the Defendant:—

This transaction was not in violation of the principle of the *Bankrupt Act*, because it was one really entered into for the advantage of the creditors, and of which they have had the full benefit. If the bankrupt had agreed to pay interest at 50 per cent., or if he had offered a bonus of £200 to the Defendant, no one could have objected. That the principal creditors knew and approved of what had been done, was clear from *Winder's* affidavit. It was clear that at law such an arrangement was free from objection.

SIR JOHN STUART, V.C.:—

Upon the principle laid down by Lord *Eldon*, in the case of *Jackman* v. *Mitchell* (2), it is impossible that this transaction can stand.

In this case, one creditor, without the knowledge of the body of the other creditors, gets more than double the amount received by them. It is not, however, the amount that vitiates the transaction.

It cannot be said that a private bargain, by which one creditor secretly obtains an advantage for himself, is a bargain for the benefit of the other creditors, because the secrecy puts them to this disadvantage, that but for the secrecy they might be willing to forego the guarantee in consideration of receiving a higher rate of dividend. It is plain that the concealment prevented them from exercising this option.

It is unnecessary to consider what would be the effect of the transaction had it been entered into by a stranger and not by a creditor, because no such circumstance exists in this case.

(1) Ch. ix. (2) 13 Ves. 581.

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It must be observed, that the Defendant, in his answer, alleges that it was not till after the other creditors had executed the deed, that he agreed to become the surety on the terms mentioned in the bill; but this is manifestly untrue, because the deed itself recites that he had agreed to become the surety.

There must be a decree for an account, and a declaration that the Defendant is not to be allowed in account more than the other creditors—eight shillings in the pound.

Mr. *Karslake* asked for the costs on the principle of the decision in *Jackman* v. *Mitchell* (1).

Mr. *Malins contra*:—

In *Mare* v. *Sandford* (2) the Court, following the decision in *Jackman* v. *Mitchell*, gave the Plaintiff the costs; but in the late case of *Mare* v. *Warner* (3), his Honour, adverting to the former case, said he thought, on reflection, that public policy would be better maintained by giving a Plaintiff who came into Court with such a case no costs. There ought, therefore, in this case to be no order for costs.

SIR J. STUART, V.C.:—

The Defendant having made an untrue statement in his answer, ought, on the ground of public policy, to pay the whole costs of the suit. The decree will follow that in *Jackman* v. *Mitchell*.

MARTIN *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

V.-C. S. 1865 Nov. 3, 4, & 6.

Lands Clauses Consolidation Act (8 & 9 *Vict. c.* 18, *ss.* 85, 87, 108, 110)— *Equitable Mortgagees.*

Decided by L.C. 11 W.R. 250; 12 W.R. Ch. app. 501.

A railway company, with full notice of an equitable mortgage, instead of proceeding under the mortgage clauses of the *Lands Clauses Act*, served the notices only on the mortgagors, made a deposit, executed bonds to the mortgagors and mortgagees, under the 85th section, and subsequently summoned a jury, who assessed the compensation. The mortgagees were not parties to the inquiry, though they were aware that it was pending:—

Held, that the mortgagees were not bound by the proceedings.

(1) 13 Ves. 581. (2) 2 Giff. 299. (3) 3 Giff. 100.

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On a bill by the equitable mortgagees the Court declined to direct a fresh valuation, but under the 87th section of the *Lands Clauses Act* applied the fund, which the Lord Justices had ordered to be treated as a deposit under the 85th section, in satisfaction of the mortgage.

THIS was a motion for decree. The bill was filed by Messrs. *Martin*, Bankers, of *Lombard Street*, against the *London, Chatham, & Dover Railway Company*, and also against *Ssliomia Sterne* and *John Lane*, who had formerly carried on business as wheelwrights on certain premises which had been taken by the company for the construction of the railway.

In 1859 *Sterne* carried on the business of a wheelwright in *Newington Causeway*, on the premises of which he was lessee. In May, 1859, he deposited the title-deeds of the leasehold with the Plaintiffs, who were his bankers, together with a memorandum stating that the deposit was to secure any balance that might become due upon the leasehold, the plant, and fixtures.

In December, 1860, or January, 1861, *Sterne* took *Lane* into partnership, and it was agreed between the partners that the leasehold premises, plant, &c., should form part of the partnership property subject to the Plaintiffs' claim. The new firm continued the banking account with the Plaintiffs.

Subsequently *Lane* filed a bill against *Sterne*, and by the decree in the cause, the partnership was dissolved as from the 24th of February, 1862. The ordinary accounts were directed, and a receiver appointed. At this time a large balance remained due to the Plaintiffs on their security. The company served notice to treat on *Sterne* and *Lane*, but no notice to treat was ever served on the Plaintiffs.

The premises in question were within the compulsory powers of the railway company, and a negotiation was opened in October, 1862, between the company and Messrs. *Sterne & Lane* and the receiver, for the purchase of the premises, in the course of which the solicitors of the company, having been informed that the Plaintiffs were equitable mortg[illegible]s of the premises, wrote to the Plaintiffs' solicitor to know the amount of the Plain[illegible]ffs' claim, in reply to which letter the Plaintiffs' solicitor wrote as follows:—

"DEAR SIRS,—I have received your letter of the 11th of October,

1862. If you have not been, you should have been, made aware that there is a suit now pending in Chancery before his Honour Vice-Chancellor *Stuart*, in which *John Lane* is Plaintiff and *Ssliomia Sterne* is Defendant. The number in the register book seems to be 1862, L, No. 1, and under which an order has been made for the dissolution of the partnership between *Sterne* and *Lane*, and for the appointment of a receiver, and the receiver is in possession of the premises. It is quite certain that neither Mr. *Lane* or Mr. *Sterne* have power to contract and agree, and whether the receiver has (subject to the interest of Messrs. *Martin*), is a question for your consideration. My clients have the title-deeds, and are equitable mortgagees to secure the repayment of the sum of £6799 6*s.* 2*d.*, and they are not willing to sell a part of the manufactory, but require that the whole should be purchased by the company."

On the 10th of September, 1863, the company, requiring immediate possession of the premises, deposited in the bank to the account of *John Lane* and others £4200, the amount of the valuation under the 85th section of the *Lands Clauses Consolidation Act*, and gave a bond to Messrs. *Sterne & Lane* and also a bond to the Plaintiffs, with conditions in the usual form. Having given the bonds and made the deposit, the company entered on the premises and ousted the receiver appointed in the cause of *Lane* v. *Sterne*. An injunction was thereupon applied for in the suit of *Lane* v. *Sterne*, and granted against the entry of the company.

Certain proceedings then took place between the railway company and the parties to the suit of *Lane* v. *Sterne*, which resulted in an arrangement that the company should be at liberty to proceed with the inquisition, on the additional sum of £4200, making altogether £8400, being paid into Court to the credit of the cause of *Lane* v. *Sterne*, to an account entitled *Ex parte the London, Chatham, & Dover Railway Company*. This was accordingly done.

On the 30th of November, 1863, the inquiry took place, and the compensation was assessed at £7550 10*s.*, of which £3500 was for the value of the leasehold, exclusive of plant, and the balance for plant, fixtures, and goodwill. The Plaintiffs had taken no part in, and had been served with no notice of any of the proceedings in the suit or upon the inquiry, but it was admitted that they were aware of the fact that an inquiry was pending.

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On the 18th of December, 1863, the Plaintiffs filed their bill against the company, and Messrs. *Sterne & Lane,* and on the 21st of December obtained an injunction restraining the company from further pulling down the premises, &c., until the purchase-money and compensation payable to them should have been ascertained and paid. On appeal, the injunction was sustained, and on an application by the company, the Lords Justices on the 9th of February, 1864, ordered the £8400, which was then standing to the credit of the cause of *Lane* v. *Sterne,* to an account entitled *Ex parte the London, Chatham, & Dover Railway Company,* to be carried over to the credit of the matter entitled "*Ex parte the London, Chatham, & Dover Railway Company.* The account of *John Lane, Ssliomia Sterne, J. J.* and *R. Martin.*" The £8400 *so carried over to be treated as a deposit by way of security under the 85th section of the Lands Clauses Consolidation Act,* 1845." The order was to be without prejudice to the questions between *Lane* and *Sterne* and the company.

The bill, in addition to the prayer for an injunction, prayed an account of what was due to the Plaintiffs on their security; that the amount due to the Plaintiffs on their security, together with costs, or such costs as the Court should think fit, might be paid out of the purchase or compensation money payable by the company in respect of the premises and plant; that the purchase-money and compensation might be ascertained under the *Lands Clauses Consolidation Act,* or in such other manner as the Court should direct; that the sum of £8400 so carried over, or a sufficient part thereof, might be applied in payment of the Plaintiffs' claim; that if necessary the premises, &c., might be sold, and the proceeds applied in payment of the Plaintiffs' claim; and that the company might pay the costs of the suit.

The company, by their answer, submitted that the sum of £8400 was in fact or under the order of the Lords Justices of the 9th of February, 1864, to be treated as a deposit by way of security under the 85th section of the *Lands Clauses Consolidation Act,* 1845, and that on payment of the sum found by the jury this deposit belonged to the company. They further submitted that the Plaintiffs were bound by the verdict.

It was contended by the Plaintiffs, but denied by the Defendant,

that the company had so altered the character of the property as materially to interfere with any fresh valuation by a jury.

There was some conflict of evidence whether the Plaintiffs' charge extended to the whole property, and included the advances subsequent to the partnership. The weight of evidence was held by the Court to be in the Plaintiffs' favour.

Mr. *Greene*, Q.C., and Mr. *T. Stevens*, for the Plaintiffs:—

The Plaintiffs are equitable mortgagees, who have proved their security, and now claim to have their debt, interest, and costs paid out of the fund in Court.

The company, it is admitted, were aware of the Plaintiffs' mortgage, and might have proceeded either under the 108th section of the *Lands Clauses Consolidation Act*, by redeeming the mortgage, or, in case the land were of less value than the mortgage debt, then under the 110th section. Had they taken this course no difficulty would have arisen.

It is clear both on principle and authority, *Ranken* v. *The East India Dock Company* (1), that the Plaintiffs were not bound by what took place before the jury; and the law was so stated by the Court at the hearing of this case before the Lords Justices. They must, therefore, be entitled to one of two things: either to have a fresh inquisition before a jury, or to have the money in Court applied in satisfaction of their claim. But the company have so dealt with the property that it would be next to impossible to have a re-valuation of the Plaintiffs' security.

In this state of things the Plaintiffs were entitled, under the 87th section of the 8th Vict. c. 18, to have the moneys paid in applied in satisfaction of their claim. By the latter part of that section it is provided that, if the condition of the land be not fully performed, "it shall be lawful for the Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall have been so deposited." It was clear the Plaintiffs were the persons for whose security, though informally, the deposit had been made, and the performance of the condition having become impossible, were now entitled to be paid out of the fund.

(1) 12 Beav. 298.

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MARTIN v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

Mr. *Malins*, Q.C., and Mr. *Kekewich*, for the company :—

The policy of the Legislature has always been to give to the person in possession of land, or entitled to the receipt of the rents and profits, the power of contracting with railway companies. The words of the 7th section of the *Lands Clauses Consolidation Act*, are general, and authorize all persons, whether tenants in tail, married women, &c. &c., and all parties for the time being entitled to the receipt of the rents and profits, to sell and convey, not only on behalf of themselves, but on behalf of all parties entitled in remainder, reversion, or expectancy, *or in defeasance of the estates of such parties*. There was nothing unreasonable in this, because the Legislature assumed that men would act on the ordinary motives that influence mankind, and that it would be for the interest of the persons having these limited interests to make the most of the property. A mortgagor in possession was within the class, because he had an estate which might be defeated by the entry of the mortgagee. The possession of the rents and profits was the test adopted by the Act.

Of course, in case of a fraudulent use of the power vested in persons having limited interests, this Court would interfere.

In this particular case no unfair advantage had been taken by the company. The mortgagees knew what was going on, and by allowing the mortgagors to remain in possession, must be taken to have acquiesced in the proceedings between them and the company, and to have constituted the mortgagors their trustees. If the Court were to hold that the persons in possession could not bind persons entitled in defeasance, it would defeat the whole policy of the Act.

The 110th section has no application to a case where the mortgagees wilfully allowed the mortgagors in possession to deal with the company, and the case cited of *Ranken* v. *The East India Company* (1) was decided on the 114th section, and had no application to the question now before the Court.

On the whole case the Plaintiffs are bound by what has taken place; but even if they are not, the only thing that can be now done is to proceed a second time under the Act in the

(1) 12 Beav. 298.

ordinary way—viz., either before a jury, or by arbitration. Those are the only two modes by which the value of land taken by the company under their compulsory powers can be ascertained. This Court has no jurisdiction to direct an inquiry at Chambers, as had been suggested.

In point of fact, what the company has done has been done under the sanction of the Court.

It is asked to direct payment of the Plaintiffs' debt out of the fund in Court; but that money has been paid in as security for the performance of the condition of the bond. On performance of that condition, viz., the payment of the amount assessed by the jury, the company will be entitled to be repaid the deposit; and the Court has no jurisdiction to apply it in the manner suggested.

Mr. *Shebbeare*, for the Defendant *Sterne*, asked for an inquiry as to the amount of the Plaintiffs' claim, and of the security on which it was charged.

Mr. *Bacon*, Q.C., and Mr. *A. E. Miller*, for the Defendant *Lane*, also asked for an inquiry, on the ground that part of the premises taken was not subject to the Plaintiffs' claim.

SIR JOHN STUART, V.C.:—

It has been contended that the Plaintiffs, being equitable mortgagees, are bound by the verdict of the jury. It has also been contended that the mortgagees are bound, because before the company were permitted to exercise their rights, the matter had been four times under the consideration of this Court. But an injunction was granted against the exercise of the compulsory powers of the Company, which was not dissolved until there had been paid into Court a sum of money, which the Lords Justices have directed me to consider as having been paid in under the 85th section of the *Lands Clauses Consolidation Act*.

The mortgagees were not parties to the proceedings before the jury, although the company had full notice that the property was in mortgage.

The *Lands Clauses Consolidation Act*, in a series of enactments, provides the mode by which property in mortgage may be

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redeemed. But in the face of these enactments, the railway company and the mortgagors thought proper to obtain the verdict of a jury awarding compensation to the mortgagors. These proceedings, as I understand, the Lords Justices considered wholly irregular, and in no wise binding on the Plaintiffs.

The Plaintiffs having proved their security, and having proved, in my opinion, that the whole of the leasehold property taken by the company is included in their security, the question is whether, as against the company and the mortgagors, they (the Plaintiffs) are entitled to have their claim satisfied under the provisions of that order which directed that the money in Court should stand as security under the 85th section of the Act.

By the bond, the company are bound to pay the sum therein mentioned as a security for payment of the compensation which might be awarded to the Plaintiffs. Probably the Lords Justices contemplated that there might be an attempt to have another inquiry, and that another jury might have to assess the value, the former proceedings having been irregular.

During their possession, the company have so dealt with the property, and have so altered it, that it must be difficult now to ascertain what was the value of it at the time when they took possession. But even if it could be ascertained, the inquiry would occasion great delay and expense, with a great risk of miscarriage before a jury.

Moreover, from the course taken by the company in issuing their warrant in defiance of the Plaintiffs' rights, they are not, in my opinion, at liberty to insist on a further inquiry.

It is not necessary to decide how far *Lane* and *Sterne* are bound by what has been done. The question to be decided is, what is to be done with the money which has been paid into Court?

The language of the 87th section of the *Lands Clauses Consolidation Act*, as to the bond given by way of security, is somewhat peculiar; but I am relieved from any difficulty because the order declares the deposit to be by way of security for the mortgagors and mortgagees.

I have no doubt that Mr. *Lane* could not have redeemed without paying the whole amount of the debt due to the mortgagees either from *Lane* or from *Sterne* and *Lane* jointly. There is great com-

plication and confusion in the proceedings. But I cannot see my way to any other conclusion, than that the fund in Court is applicable primarily to satisfy the mortgagees.

There must be an account of what is due to the Plaintiffs for principal, interest, and costs upon the security in the pleadings mentioned, and an order that what shall be certified to be due to them for principal, interest, and costs, be paid out of the sum of £8400 and accumulations standing in the matter. Direct that the balance, if any, shall remain, subject to such application as the Defendants (the mortgagees and the company), or either of them, may be advised to make in respect thereto.

M. R.

1865

Nov. 22;
Dec. 6.

DE HOGHTON *v.* MONEY.

Purchaser for value—Voluntary agreement—Cancellation.

A purchaser for value of an interest in land cannot require a voluntary deed or agreement affecting the estate to be delivered up to him to be cancelled.

THE parties to this suit were all officers of the 6th Tower Hamlets Rifle Volunteers, the Plaintiff, *Sir Henry de Hoghton*, being the Honorary Colonel; the Defendant, *George Henry Money*, the Lieutenant-Colonel; the Defendant, *St. Pierre Butler Hook*, one of the captains; and the Defendant, *George Cotton*, an ensign.

Cotton carried on business as a victualler at the "Royal Standard" tavern, *Hoxton*, in the immediate neighbourhood of the head-quarters and drill-hall of the regiment. Adjoining the tavern, and also the drill-hall, was a triangular piece of ground, a little under half an acre in size. In 1861, *Cotton* became the purchaser of the residue (thirty-five years from the 2nd June, 1862) of a term in this plot, at the price of £500; the rent being a peppercorn. The plot was very suitable for a drill-ground for the regiment, and for the erection of a mess-room; and between August, 1861, and the beginning of March, 1862, negotiations went on between the Plaintiff and the Defendants, *Money* and *Cotton*, for the purchase of it for these purposes. A day had been fixed for the completion of the purchase, when an entire stop was put to the arrangement by a letter written by *Cotton* to *Money* on the 11th of March, 1862. This letter was partly in the following terms:—

"I wish you and the officers of the 6th Tower Hamlets Rifles clearly to understand that it was always my intention and wish that the regiment should enjoy the use of that piece of ground at my expense, and for the period of my lease, if the regiment should exist so long; and that I would build for the use of the regiment a mess-room. Of course it was not my intention to part with the lease itself, and in case the regiment should cease to exist before the termination of my lease, or in case the regiment should not require the ground, then in either of these cases it would return to me as the owner of the lease.

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"Now, to terminate all misunderstanding upon the point, permit me to say that I am now willing to give our regiment, the 6th Tower Hamlets, the full and entire use of that piece or parcel of ground situate near the new drill-hall, *Hoxton*, formerly a theatre, and of which I have purchased the residue of the lease from Mr. *Thorne*, if the regiment should exist so long, and if the regiment should require it for that period, upon this understanding, that the regiment, from its own funds or otherwise, will level or cause to be filled up the said piece of ground, and will so prepare the same as to fit it for a proper drill-ground, for which purposes only it is to be used; and I will also give to the regimental funds the sum of £200, to be used for the purposes of building an armoury and mess-room, with other accommodation for the use of the said regiment, and for regimental purposes only. The building may be placed upon the said piece of ground in any position you, as colonel of the regiment, may select, with this further understanding, that all the covenants of my lease are to be binding upon and fulfilled by the regiment; and that the ground and mess-room shall be kept in a proper state of repair, and that the regiment shall pay or cause to be paid to me, or my executors or administrators, the sum of £1 sterling per annum so long as they continue to hold and enjoy the use of the said piece of ground and mess-room, as an acknowledgment that the ownership of the lease still remains with me, or with my executors or administrators for the time being; and upon your paying to me £1 (one pound) in advance, you may consider that this letter at once gives you the full right and legal title to use the aforesaid piece of ground as effectually and to all intents and purposes as though a regular lease had been executed between us.

"I am, my dear Colonel,

"Yours ever truly,

"G. COTTON.

"Witness to the signature of Mr. *G. Cotton*,

"JOHN IVIMEY, Junior."

It appeared that this letter was written at the instigation of Mr. *Grissell*, another officer in the corps. On receiving it Colonel *Money* signed it himself, and caused his signature to be attested; and he afterwards had the document stamped as a lease. The regiment

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took possession of the ground, and began to level it and use it as a drill-ground soon after the date of the letter; and the annual rent of £1 was regularly paid up to the year 1864.

On the 24th of May, 1864, the Plaintiff entered into an agreement with *Cotton* for the purchase of the piece of land in question, and *Cotton's* entire interest therein, "without any reservation whatsoever, except as to a disputed right claimed by Lieutenant-Colonel *George Henry Money*, in respect of a certain letter addressed to him by Mr. *Cotton*, and dated on or about the 11th of March, 1862," at the price of £550; and *Cotton* also agreed to permit the free use of his name, and to afford every facility in bringing actions or filing bills in Chancery, or in any other proceeding which the Plaintiff might deem it advisable to institute for the purpose of setting aside the letter of the 11th March, 1862, or any rights claimed by the Defendant *Money*, either for himself or on behalf of the regiment thereunder; and also that he would accept no further rent from the regiment.

By an indenture dated the 10th of June, 1864, the Defendant *Money* purported to convey the same piece of land to the Defendant *Hook* and himself, as trustees for the regiment.

On the 20th of July, 1864, the bill was filed. It alleged, amongst other things, that the letter of the 11th of March, 1862, was obtained from *Cotton* by concealment, surprise, and improper influence, and was therefore void. It prayed that the rights and interests of the parties in and to the said piece of land might be ascertained and declared; that it might be declared that the letter of the 11th of March, 1862, conveyed no estate or interest to the Defendant *Money*, or any other person, and was intended by *Cotton* to operate only as a license revocable at pleasure to the said regiment, to use the said land as a drill-ground, and that the same was improperly obtained, and was void and of no effect, and ought to be delivered up and cancelled; that the indenture of the 10th of June, 1864, might be declared void, and delivered up to be cancelled; that the agreement of the 24th of May, 1864, might be decreed to be specifically performed; and that the Defendants might be ordered to execute a proper conveyance of the land to the Plaintiff, free from the claim of the Defendant *Money*.

Cotton offered no opposition to a decree, so far as he was concerned.

Mr. *Baggallay*, Q.C., Mr. *Jessel*, Q.C., and Mr. *W. Downing Bruce*, for the Plaintiff, submitted that on the evidence the letter of the 11th of March, 1862, had been obtained by Colonel *Money* taking undue advantage of his position as commanding officer of the corps, and ought therefore to be set aside; *Cooke* v. *Lamotte* (1).

Mr. *Southgate*, Q.C., and Mr. *Stock*, for *Cotton*.

Mr. *Selwyn*, Q.C., Mr. *C. T. Simpson*, and Mr. *Talfourd Salter*, for *Money* and *Hook*, argued that no undue influence had been used by Colonel *Money;* and further, they submitted that these Defendants had been improperly made parties to the suit; *Tasker* v. *Small* (2).

Mr. *Jessel*, in reply:—

All that has been decided by *Tasker* v. *Small* (2), *Mole* v. *Smith* (3), and that class of cases, is that a stranger to a contract cannot be made a party to a suit, the sole object of which is to enforce the contract, for the sake of establishing the title. But here the bill, being for the delivery up of documents improperly obtained, can be supported without reference to specific performance at all. It is in fact a bill by an equitable owner to obtain possession of his estate; such a bill may be maintained even though the person in whom the legal estate is vested is willing to convey; *Vernon* v. *Wright* (4).

Dec. 6. SIR J. ROMILLY, M.R., after stating the facts, continued:—

The question in this state of circumstances is, what is the character and effect of this letter of March, 1862? whether it is of such a description that this Court can order it to be delivered up to be cancelled? In the first place, I am of opinion that this document was not obtained by fraud or misrepresentation, duress,

(1) 15 Beav. 234.
(2) 3 My. & Cr. 63.
(3) Jac. 490.
(4) 7 H. L. C. 35.

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or undue influence. I am of opinion, on the evidence both of Mr. *Cotton* and Mr. *Grissell*, that Mr. *Cotton* fully understood the value of the property, and what he was offering to give up; and though the letter was obtained somewhat hastily, that no pressure or improper influence was exercised for the purpose. It was, in my opinion, purely voluntary. My belief is that Mr. *Cotton* expected to derive advantages from this act of generosity which have not been realized; but whether this surmise of mine be or be not correct, it cannot, in my opinion, affect the question which I have to decide.

The question is, Can I declare this document to be void, or order it to be delivered up to be cancelled? First, I will treat it as if it had been a deed under seal, and consider how I could have dealt with it if an application had been made by Mr. *Cotton* to have it delivered up and cancelled before the contract was entered into between himself and the Plaintiff. Next, I will consider how the matter is affected by the subsequent contract between the Plaintiff and Mr. *Cotton*. And finally, I will consider how the question is varied by the fact that the document in question is not a deed, but simply an instrument signed by Mr. *Cotton*.

The principle of this Court, established in a great number of cases, is, that it will not interfere between volunteers, that is, in the legal sense of the word, between voluntary donors and donees, but will leave them to their remedy at law, whatever that remedy may be. The Court will not, at the instance of a donor who repents of his gift, cause the deed of gift to be delivered up, nor will it, at the instance of the donee, interfere to complete an imperfect deed of gift. This is fully discussed by Sir *James Wigram* in *Meek* v. *Kettlewell* (1), and is laid down in so many cases that it is needless to refer to them. I have had the cases frequently before me, and the decisions are familiar to every practitioner in the Court. If, therefore, this had been a deed, and Mr. *Cotton* had required it to be delivered up to be cancelled, the Court could not properly have interfered.

I have next to consider whether the contract entered into between the Plaintiff and Mr. *Cotton* in any respect alters the case; and in my opinion it does not. It is true that the Statute

(1) 1 Hare, 464.

of the 27th of Elizabeth makes a voluntary conveyance of land void as against a purchaser for value; but although this is the case even where the purchaser had notice of the voluntary deed, it has never been held that a purchaser for value could come into this Court to have a voluntary deed delivered up to be cancelled. The Court leaves both parties, in such a case, to their legal rights and remedies.

Lastly, can the circumstance that the document is not under seal alter the principles of equity as applicable to the case? I am of opinion that it cannot. These principles do not depend upon the nature of the instrument, but upon this—that as between donor and donee, where everything is straightforward on both sides, this Court will not assist either party; that, in other words, it is not a matter of equity and good conscience that a repenting donor should not be allowed to recall his gift, or that he should be compelled to complete the gift which he has promised to make. The document in this case is a mere informal instrument which has but little efficacy at law. If Colonel *Money* had instituted a suit to have a regular assignment of the lease executed to him, it is difficult to see how that suit could have been supported. It makes no difference that Colonel *Money* claims no personal beneficial interest in the land, and only claims it as trustee for the regiment. If Mr. *Cotton* had filed the bill to have it delivered up to be cancelled, it is equally difficult to understand on what equitable grounds such a suit could have been supported. This bill seems to have been framed upon the supposition that the contract between Mr. *Cotton* and the Plaintiff gave the Plaintiff a right to relief in equity which Mr. *Cotton* himself could not have enforced. In my opinion this is erroneous; and although the sale for value may in some cases, by virtue of the 27th of Elizabeth, give the purchaser an advantage at law which the donor could not have obtained in equity, it does not, in my opinion, in equity have any such effect, but the purchaser can only do what the vendor himself could have done. In truth, I was somewhat at a loss to understand, during the argument, the reasons which induced the Plaintiff to file this bill. The document in question of the 11th of March, 1862, conveys no legal estate; and if so, then upon the conveyance by Mr. *Cotton* to the Plaintiff, he might possibly have brought his

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ejectment. If the document has any legal operation at all, it appears to me to be confined to giving Colonel *Money* a tenancy from year to year, which might have been concluded by a proper notice to quit; and if he had then come to this Court for assistance, he would have been met by the series of cases to which I have already referred.

Throughout the observations I have hitherto made, I have treated the document of the 11th of March, 1862, as a purely voluntary instrument; and such, on considering the document itself, it is in my opinion. I think it obvious that the conveyance of a leasehold property, which has thirty-five years remaining of its term, and which is worth £500, in consideration of a rent of 20*s.* a year, is a transaction which cannot be supported as a purchase for valuable consideration. The inadequacy of price alone would be a badge of fraud if it were so treated. But unquestionably, the conveyance may be supported as a voluntary gift by the donor to one whom he was disposed to favour. If, for instance, it had been conveyed to a charity on such terms, it could not be considered as a purchase by the institution, but it might well be treated as a gift to it, if done by a person who understood the full nature and effect of the instrument he was executing. But, if it be assumed that I am mistaken in this view of the case, and if the document of the 11th of March, 1862, can be treated as a legitimate sale of leasehold property for valuable consideration, then it is obvious this Court could not interfere to cancel a document given for value received by the person who signed it, and who did so with full knowledge of what he was doing, and without undue influence being used against him.

The bill also prays for the delivery up and cancellation of the deed of the 10th of June, 1864; but it follows, necessarily, from what I have said, that this Court cannot interfere to order the deed of the 10th of June, 1864, to be delivered up to be cancelled. If I am right, that the document of the 11th of March, 1862, gave Mr. *Money* nothing which he could convey to Mr. *Hook*, unless it be a tenancy from year to year, then nothing more is, by the deed of the 10th of June, 1864, vested in them, or either of them. It is simply as if a stranger should take upon himself to convey the estate of another to a third person. For the same

reason, I cannot order Colonel *Money* and Mr. *Hook* to join in executing a proper legal assignment to the Plaintiff of the land in question, as prayed by the bill. Either there is nothing in them, or either of them, by reason of the document of the 11th of March, 1862, and the deed of June, 1864; or, if there be, the parties must be left to their remedy at law, and this Court will not interfere.

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This bill, in my opinion, fails as regards the Defendants, Colonel *Money* and Mr. *Hook*, and must be dismissed against them with costs. The decree against Mr. *Cotton* is a matter of course, but must be without costs. Indeed, it is not opposed by him, but, in fact, it is for his benefit that the suit has, in a great measure, been instituted.

I do not suppose it is necessary to add it, but it is, of course, understood that this is without prejudice to the Plaintiff or Defendants instituting any proceedings at law that they may think fit.

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M. R. 1865 *Nov.* 16, 17, 24.

Injunction—Sewage—Nuisance—Increasing injury.

Injunction granted to restrain commissioners for draining a town from causing the sewage to be discharged into a stream passing through the Plaintiff's land, and feeding a lake therein situated, when the sewage injuriously affected the water of the stream and lake, and had done so for some years, and the pollution of the water perceptibly increased as new houses contributed their sewage to the stream.

Semble—In such a case no prescriptive right could be claimed by the commissioners to discharge the sewage through the stream.

THE Plaintiff, Mr. *F. D. Goldsmid*, was tenant for life of *Somerhill*, near *Tunbridge Wells*. The estate comprised a mansion, where the Plaintiff resided, and a park in which was a lake or piece of water of considerable extent, used for the watering of cattle, and supplying, in the winter, rough ice for domestic use. The lake was fed by a stream or brook, called *Calverley Brook*, rising in *Tunbridge Wells*, and which, after passing through *Colebrook Park*, flowed altogether about two miles and a half through the Plaintiff's land.

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The Defendants were the commissioners under an Act for lighting, cleansing, and improving the town of *Tunbridge Wells*, which gave full powers to drain the town, to make sewers, and to turn any drain or sewer into any common ditch or watercourse.

The bill alleged that the town of *Tunbridge Wells* had within a few years greatly increased, and was still increasing, that the drainage of the town had been much improved, and that a considerable increase of sewage had been carried into the public drains, and thence to *Calverley Brook*; that the brook now received a large part of the sewage of the town, the Defendants having converted it into their main sewer; that the water of the brook was contaminated by the sewage water and other feculent and offensive matters so conveyed into it, and thereby the water of the brook in the *Somerhill* estate, and of the Plaintiff's lake, which was formerly pure and suitable for drinking and household purposes, was no longer fit to drink or for domestic use.

In 1860, shortly after the Plaintiff had become tenant for life of the estate, the lake was cleansed of the silt and mud which had accumulated therein, and the Plaintiff caused a dam to be erected at the upper end of the lake to intercept the passage of silt and mud into the lake from *Calverley Brook*, which was received into a reservoir. At that time, as the Plaintiff alleged, the silt or mud was not perceptibly affected by the sewage. This was first observed by the Plaintiff's resident agent in April, 1864, when he was informed that the labourers on the Plaintiff's estate, and in the neighbourhood, who had been accustomed to use the water for drinking, were then unable to do so from its impurity; and the occupiers of a mill below the lake complained of the water from the lake and brook as so offensive as to be injurious to health.

The bill alleged that the impurity complained of was caused by the sewage of the town passing through the brook; that the Defendants refused to stop the discharge of sewage into the brook; that the injury to the Plaintiff's water by the sewage had been gradually increasing for three or four years, and would be greatly increased by the increased quantity so to be emptied as the town increased.

The bill prayed that the Defendants might be restrained by

injunction from causing or permitting the sewage and other offensive matters draining from the town of *Tunbridge Wells* to be discharged or flow into the brook or stream, or to pollute the water of the Plaintiff's lake and mill-stream, or to injure the health of, or otherwise injuriously to affect, the Plaintiff, his family, tenants, servants, and workmen, resident or employed on the mansion, park, mill, and estate.

The Plaintiff's case was supported by the evidence of persons residing on and near his estate, who deposed to the increasing amount of contamination in the brook and lake, and stated that the water which some years ago was fit to drink, was now perfectly unfit for use. Mr. *Voelcker*, an analytical chemist, was also examined as to the actual state of the water.

The principal points deposed to by the Defendants' witnesses were as follows:—That the sewage of *Tunbridge Wells* had always flowed into the said brook; that the solid parts of the sewage matter conveyed along it were intercepted by bays or ponds for irrigating and manuring purposes; that the sewage matter in the lake arose from the farms and farm cottages in the valley through which the brook passed on its way to *Somerhill* below the said bays or ponds; that a pond at a mill called *Brokes's* mill, through which the stream flowed between the town and *Somerhill*, contained a good many fish, and that persons were frequently in the habit of fishing there. According to the evidence of Mr. *Heisch*, Professor of Chemistry at Middlesex Hospital, "the analysis of the water taken below the powder-mill (some two miles nearer the sewer than *Somerhill*) shews that it contains less impurity, both organic and inorganic, than the water in *Somerhill Lake*, which clearly proves that there are sources of contamination between that point and *Somerhill*; one of these is clearly this, that the lake is much surrounded by trees, the dead leaves of which fall into it and then decay and form a deposit of leaf mould. . . . . I am convinced that no nuisance or injury to the water in *Somerhill Lake* is caused by any of the sewage from *Tunbridge Wells* finding its way into such lake."

Mr. *Rolt*, Q.C., and Mr. *Baggallay*, Q.C., for the Plaintiff:—

The Plaintiff is entitled to an injunction, whether as regards the

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jurisdiction of this Court to prevent an anticipated injury or to redress a wrong actually existing. It cannot be said, because to a certain limited extent drainage has been carried into this brook for many years, that therefore the Plaintiff comes too late; for, though a legal right might accrue to the occupier of a single house by its drainage being carried into the lake for twenty years, yet that will not be the case with a town, and no prescriptive right can be acquired by the occupiers residing in it. Further, the Defendants have no right to send fœcal matter through the Plaintiff's water, or to deposit it on his land. The jurisdiction to prevent an injury in similar cases was assumed in the *Birmingham Canal Company* v. *Lloyd* (1), and the *Earl of Ripon* v. *Hobart* (2), though in neither of these cases was it exercised. In *Haines* v. *Taylor* (3), the injunction was refused because certain works had been commenced in order to remedy the nuisance complained of, which was not the case here. In the *Attorney-General* v. *the Mayor of Kingston* (4), the jurisdiction in a similar case was recognised, but the Court being of opinion that there was no existing nuisance, the injunction prayed for was not granted. Here, a present injury to some extent is clearly shewn, which in the course of time will become a great evil; this, therefore, is the proper time to apply, and the Court will not postpone its remedy. It cannot be said that the relief prayed for against the Defendants is opposed to the public interests; for, though where public interests come in conflict, one may be balanced against the other, yet in the case of a private right, that must prevail against public interests.

Mr. *Renshaw* (on the same side) referred to *Bamford* v. *Turney* (5), *Stockport Waterworks Company* v. *Potter* (6), *Attorney-General* v. *Metropolitan Board of Works* (7), *Attorney-General* v. *Sheffield Gas Consumers' Company* (8), *Cator* v. *Board of Works for Lewisham* (9).

(1) 18 Ves. 515.
(2) 3 My & K. 169.
(3) 2 Phil. 209.
(4) 13 W. R. 888.
(5) 3 B. & S. 62, 66.
(6) 7 Jur. (N. S.) 880.
(7) 1 H. & M. 298.
(8) 3 D. M. & G. 304.
(9) 11 Jur. (N. S.) 340.

Mr. *Selwyn*, Q.C., and Mr. *J. Pearson*, for the Defendants :—

The Plaintiff's evidence fails to prove such a nuisance as to entitle him to an injunction. For nine months in the year the sewage is neutralized and deodorized by being used for irrigation before the water passes into the lake. According to Professor *Heisch's* evidence, the contamination of the lake is attributable to other sources. Besides, it is proved that the water of the brook is purer nearer to the town than in the lake. The evidence of contamination is not so strong as in the *Attorney-General* v. *Mayor of Kingston* (1), yet there Vice-Chancellor *Wood* refused to grant an injunction. A court of equity will not exercise its jurisdiction in such a case, unless there is proof of such substantial injury as would entitle the Plaintiff to damages at law. As to the apprehended future injury, the Court is asked to assume that the Defendants will so neglect their duty as not to take proper precautions. This is not a case for granting a *quia timet* injunction. The cases of the *Attorney-General* v. *Borough of Birmingham* (2), and the *Earl of Ripon* v. *Hobart* (3), are distinguishable. In the latter case, the property of the Plaintiff would inevitably have been destroyed but for the interference of the Court. Here there is no case of overwhelming injury. The Court will have regard to the public interests, which require the sewage to be thus removed from the town. There is no fear of a prescriptive right being acquired, for it is found that the stream has been, to some extent, polluted for many years. When the town of *Tunbridge Wells* so increases as considerably to augment the sewage carried through the brook into the Plaintiff's lake, then, and not till then, will he be entitled to apply to the Court.

Mr. *Rolt*, in reply :—

The Plaintiff's case is this : First, some injury to the Plaintiff's property already results from the sewage matter sent down the stream by the Defendants. Secondly, the Defendants threaten and intend to continue the present state of things, by which the sewage of existing houses flows down the stream. Thirdly, this injury already existing will increase. Fourthly, the Defendants threaten and intend to carry the drainage of newly-built houses

(1) 13 W. R. 888. (2) 4 K. & J. 528. (3) 3 My. & K. 169.

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into the stream. The ultimate result is that a gross, palpable nuisance is rapidly approaching. This state of things entitles the Plaintiff to an injunction, which may be so framed as to enable the Defendants to make arrangements to prevent the nuisance. This is not strictly a case to which the principle of *quia timet* applies, for the sewage is already carried into the brook. Nor is the danger one that is distant, and slowly increasing, as in the *Attorney-General* v. *Mayor of Kingston* (1), but it is near and rapidly increasing.

Nov. 24. SIR J. ROMILLY, M.R.:—

I think the evidence in this case establishes that the sewage water from the town of *Tunbridge Wells*, which flows into the brook which passes through the Plaintiff's land, injuriously affects the water in that brook, and also the water of the lake in the park of the Plaintiff. I think, upon the evidence, that it has done so for a considerable time; that it has increased of late; and that it is perceptibly increasing from time to time, according as fresh houses contribute their sewage to the brook.

In examining the evidence, there is some difficulty in keeping distinct in the mind that portion of it which relates to the *land* of the Plaintiff, and that portion which relates to the *lake* of the Plaintiff. This is the more important, because this is the state of the case: It appears that the brook, as I judge from the plan, flows through the Plaintiff's lands for about two miles and a half. If the whole of the evidence is correct (though some difficulty may be felt with respect to the recollections of persons for so great a length of time), some sewage has been permitted to flow into the brook for fifty years and upwards. But it is established that some twenty years ago the water in the brook was pure and fit to drink, and it was fit to use for every species of domestic purposes; and this in every part of the Plaintiff's land, including *Broke's Farm*. This is proved by many witnesses, one of whom says that the lake was formerly perfectly clear, and that during the last four or five years he has observed a great change in the water of the lake. Another witness says that six years ago the water was fit for use,

(1) 13 W. R. 888.

but that after a year or two it became unfit to drink, and has become gradually worse. Another says that eight years ago he drank the water from the lake; and another, that eleven years ago he lived for eight years close to the stream, and constantly used the water. Another witness says that twenty-two years ago the water was perfectly good, and that it is now perfectly unfit for use. Another states that it has been injurious for about ten years; and another that fifteen years ago the water was drunk. I hold that to be conclusive evidence that at some time (the period of which is not very accurately defined, but which may be stated to be at least ten years ago) the water was fit for domestic purposes, and that previously to that time (the period of which is not very clearly defined) it was also perfectly fit to drink.

The present state of the brook is proved by various persons. It is admitted, or rather proved, on both sides that the water, when it leaves the mouth of the sewer, is very foul, and that it continues more or less so till it passes through *Colebrook Park*. During certain seasons of the year it is, in a great measure, but not wholly, diverted for the purpose of irrigating the lands in *Colebrook Park*, which, during the time it is so diverted, produces a great purification of the water, at all events, of that portion which is taken.

Now the principal introduction of sewage into the brook appears to me to have commenced about 1846, after the passing of a local Act, by which the sewage of a considerable portion of the town was introduced into the stream; but all the evidence which I have referred to seems to me clearly to establish that the brook is in a very foul state at the mouth where it leaves the sewer; that that foulness gradually diminishes the whole way it passes along, but never leaves it, not even when it has passed through the lake, and left the Plaintiff's land.

Mr. *Voelcker's* evidence, and his report, shews clearly that there is a considerable amount of sewage water in the brook even in the month of October. As to the present state of the brook, the evidence shews clearly, first, that it is such that the property of the Plaintiff is seriously injured by the pollution of the stream which flows through it; secondly, that this pollution is occasioned by the sewage discharged from the town into the brook; and

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thirdly, that it has been of slow and gradual growth; that it has increased, and is now increasing; and that in process of time the stream will become an absolute nuisance to all those who reside on its banks or in its immediate vicinity.

I do not find that the Defendants' evidence discredits or qualifies to any extent the evidence to which I have referred. The theory to which it is directed is not that the stream is not polluted, but that the pollution arises from the water flowing from farm lands highly manured. I believe that theory to be totally opposed to all experience. I believe that the water which percolates through the land from the manure placed on it produces no injurious effect at all, and that if the pollution of the stream were to be attributed to that cause the gradual and constant increase of it would be wholly unaccountable. Mr. *Heisch* attributes the state of the lake to the quantity of leaves that fall into it, but I am of opinion that that is insufficient to produce the result clearly proved by persons residing on the banks of the stream whose evidence is unshaken.

So the matter stands. But the evidence rather points to something like this, that the thing has been going on for such a number of years that it would be too late to complain of it now; in fact, one witness says it has been going on for fifty years—several say it has been going on for twenty years. I have no doubt it has been extending for some time, and that it has been perceptible to some extent for some time, at all events, from 1846, as soon as the first local Act came into operation. And it is to be observed that the amount of the sewage will shew its influence in the direct proportion to the quantity that is sent forth on a greater extent of country; that is to say, a certain amount of sewage may produce injurious effects, gradually diminishing for a mile, and a greater amount of sewage may produce greater injurious effects which may extend for two miles; but I do not doubt that there is some point at which, probably, with almost any amount of sewage, the stream would be ultimately comparatively pure, and that it is only a question of degree.

It is to be observed also, which is an observation of importance in this case, that the injury to the Plaintiff's land is not confined to his lake, to which so many of the witnesses for the Defendants direct their testimony; but in point of fact it extends to the whole

of his land. But it is important to observe what the position of a gentleman in the situation of the Plaintiff is. If he comes to the Court and complains very early, then the evidence is that "it is not perceptible"—"it is wholly inappreciable"—and you get evidence after evidence for the Defendants (the pollution being slight, and perhaps only observable at some times and on some occasions) saying, 'You have no proof at all that there is any appreciable pollution, and you must wait until it becomes a nuisance.' Then he waits for five or six years until it is obvious to everybody's sense that the pollution is considerable, and then they say, 'You have come too late, you have allowed this to go on for twenty years, and we have acquired an easement over your property and a right of pouring the sewage into it.' My opinion is that any person who has a watercourse flowing through his land and sewage which is perceptible is brought into that watercourse, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing, from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him.

This is a matter of very great importance; and it has been suggested to me in argument, as a matter that ought to be regarded, that private interests must give way to public interests, that the Court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals.

I do not assent to that view of the law on the subject; and I apprehend that the observations which were quoted to me of Vice-Chancellor Sir *William Page Wood*, in the *Attorney-General* v. *the Mayor of Kingston* (1) are perfectly accurate, and that private rights are not to be interfered with. But my firm conviction is, that in this, as in all the great dispensations and operations of nature, the interests of individuals are not only compatible with but identical with the interests of the public; and although in this case I have only to consider an injury to a private individual —the Plaintiff on the present occasion—yet I believe that the injury to the public may be extremely great by polluting a

(1) 13 W. R. 888.

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stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the public and the Court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle, and contagious diseases affecting human beings, such as cholera or typhus and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance.

I make that observation, not as being the ground on which I proceed, which is injury to the Plaintiff, but to repel the argument put forward by the Defendants, and to point out that it is for the interest of all persons in the neighbourhood and the public that every particle of noxious pollution should be removed from the sewage speedily. That is feasible by ordinary means, and with little expense, as the Court has had experience in many cases, and then the sewage matter becomes an advantage instead of being a nuisance.

I am of opinion that Mr. *Goldsmid* was not bound to remain quiet until this stream had become such a nuisance that it was obvious to everybody near its banks; and the result is that in my opinion he is entitled to a decree for an injunction to restrain the Defendants from causing or permitting the sewage and other offensive matters draining from the town of *Tunbridge Wells* to be discharged into the *Calverley Brook* or stream in such manner as injuriously to affect the water of the brook as it flows through the Plaintiff's land.

I pronounce the order for the injunction, but no further steps will be taken to enforce it till the last day of *Hilary Term*, nor even then if the Defendants are taking steps to prevent the nuisance. The Plaintiff must have his costs.

MONTEFIORE *v.* BEHRENS.

M. R.
1865
Dec. 7.

Husband and Wife—Settlement—Wife's property—Determinable life interest—Forfeiture—Charging order—1 & 2 Vict. c. 110, s. 14.

A settlement may be made of a legacy to which a married woman becomes entitled during coverture, so as to give her husband a life interest determinable on bankruptcy or alienation.

A charging order, under section 14 of 1 & 2 Vict. c. 110, creates such an incumbrance as will determine a life interest, limited to a person, until he executes some assignment or act whereby the interest may be incumbered.

THIS was a suit for the administration of the trusts of the settlement made on the marriage of Mr. and Mrs. *Behrens*, and dated the 24th of January, 1843, whereby the sum of £10,600 Three per Cent. Consols, the property of Mrs. *Behrens*, was vested in trustees upon trust, after the solemnization of the marriage, to pay the income thereof, during the joint lives of Mr. and Mrs. *Behrens*, to Mrs. *Behrens*, for her separate use, without power of anticipation, and after the decease of either of them, upon the same trusts, if Mrs. *Behrens* should be the survivor; but, if Mr. *Behrens* should be the survivor, upon trust, to pay the income thereof to him until (amongst other events) he should at any time assign, transfer, or in any manner part with the same, or any part or parts thereof, or should "execute any assignment or other assurance, contract, act, matter, or thing whatsoever, by means whereof the same should be aliened or incumbered either at law or in equity;" and there were various limitations over. There was no agreement as to the settlement of after-acquired property.

Subsequently to the marriage, Mrs. *Behrens* became entitled to a legacy of £500 Three per Cent. Consols, which, with the consent of her husband, was paid to the trustees of the settlement; and he subsequently signed a memorandum in writing, stating that he intended the last-mentioned sum to form part of the trust funds subject to the settlement.

Mrs. *Behrens* died on the 21st of February, 1854.

In the month of October, 1856, one *Smith* obtained a charging order on the £500 Consols, but it was afterwards discharged by Mr. *Behrens*.

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On the 30th of March, 1858, one *Hughes* obtained a charging order on the same sum; and on the 8th of April, 1858, Messrs. *Camps & Partridge* obtained another charging order thereon. On the 10th of March, 1864, Mr. *Behrens* was outlawed.

The bill was filed by the trustees; and the children of the marriage, *Hughes* and *Camps & Partridge*, were the Defendants.

Mr. *Jessel*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiffs, asked for a declaration that the interest of Mr. *Behrens* in the trust funds had determined at the date of the first charging order.

Mr. *Renshaw*, for the children.

Mr. *Freeman* for *Hughes*, and Mr. *Pemberton* for *Camps & Partridge*:—

The sum of £500 was the property of the husband, and he could not settle it so as to give himself a life interest determinable on alienation: *Higinbotham* v. *Holme*. (1) It is true that it was subject to the wife's equity to a settlement, but she had already been sufficiently provided for.

At all events, no forfeiture took place till he was outlawed, for a charging order does not create an incumbrance on the fund; it simply gives the creditor a right, to be enforced by filing a bill, 1 & 2 Vict. c. 110, ss. 13, 14; *Whitfield* v. *Prickett* (2).

SIR J. ROMILLY, M.R.:—

I am against the creditors on both points. I think this fund was the wife's property, and that she was entitled to have it settled, if she so thought fit, without giving her husband's creditors any right to it. I consider that the case is the same as if the fund had been settled by the order of the Court. Such an order might have been made either if the trustees had refused to pay over the fund, or if the wife had herself filed a bill to establish her equity to a settlement. In these cases the Court does not inquire very nicely whether a sufficient settlement has already been made; and if a bill had been filed, and then the husband and wife had agreed that the fund should be settled in the way in which it has been done here, the order

(1) 19 Ves. 88. (2) 13 Sim. 259.

would have been made without further inquiry, and then, of course the fund would have been subject to all the trusts of the settlement.

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As to the other point, the husband has clearly done that by which the fund is incumbered. It is impossible to hold that a charging order does not create a charge; in fact, it would be a contradiction in terms if it were otherwise. It is true that a judgment does not create a charge on personal property of itself, till an order for that purpose is obtained, but when that is done, a charge is created.

LAKE *v.* PEISLEY.

M. R. 1865 Dec. 16.

Practice—Cons. Ord. xix. Rule 4—Order of course—Depositions in Bankruptcy.

An order of course may be made, under Cons. Ord. xix. Rule 4, to read at the hearing of a cause proceedings in bankruptcy, including depositions.

IN this case an application had been made to the Secretary of the Master of the Rolls for an order of course that the Plaintiff might be at liberty to read and make use of certain proceedings in bankruptcy, including depositions, at the hearing of the cause under Consolidated Order xix. Rule 4, which is as follows:—"Decrees in other Courts may be read upon the hearing, without an order. But *no depositions taken in any other Court shall be read unless by order.*" His Honour's Secretary having declined to make the order as of course, the matter was now brought before the Court.

Mr. *J. N. Higgins* appeared in support of the application, and referred to *Ernest* v. *Weiss* (1), where the Master of the Rolls had granted an order of course, saving just exceptions, to read in another suit affidavits in proceedings under a winding-up order.

SIR J. ROMILLY, M.R.:—

I think an order of course may be made to read the proceedings, including the depositions, saving all just exceptions.

(1) 1 N. R. 6.

M. R.
1865
Dec. 15, 16.

TAIT *v.* LATHBURY.

Trustees—Power of sale—Real estate treated as personalty.

A settlement of personalty upon the usual trusts contained a power for the trustees to sell the trust funds, and invest in the purchase of real estate, to be held upon such trusts as would best correspond with the subsisting trusts, and that such real estate should be considered as personal estate for the purposes of the settlement. There was no express power of sale over the real estate so purchased:—

Held, that the trustees had a power of sale over purchased real estate.

THIS was a suit for specific performance of a contract for sale by the trustees of a marriage settlement. The Defendant was a willing purchaser, and the object of the suit was to obtain the opinion of the Court whether the trustees could exercise their trust for sale in respect of the land proposed to be sold, and give a good discharge for the purchase-money.

By the settlement on the marriage of *John Bryan* and *Ann Bryan*, a share of real and personal estate was assigned and transferred to the trustees upon trust, that they should stand possessed of the stocks, funds, and securities upon which it should be invested in trust for the wife and children of the marriage; and it was provided that, notwithstanding any of the trusts therein contained, it should be lawful for the trustees to make sale of any part of the trust stock, funds, and securities respectively, and invest the produce thereof in the purchase of freehold or copyhold estates, to be conveyed to the use of the trustees *upon such trusts as would best correspond with the then subsisting trusts* thereinbefore declared, and that such real estate, when so purchased in pursuance of the said power, *should be considered as personal estate for the purposes of the settlement*, and go accordingly. And it was provided that it should be lawful for the trustees to make sale of the stocks, funds, and securities so to be purchased under the trusts thereinbefore contained, and invest the money, and to alter, vary, or transpose such securities or funds so to be taken. The settlement contained no express power of sale over the real estate to be so purchased, and no power to give receipts.

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After the date of the settlement a sum of stock, part of the settled property, was sold, and certain copyhold hereditaments, the subject of the present contract, were bought with the proceeds.

The bill was filed by the husband and wife and the trustees, in consequence of doubts being entertained as to the power of the trustees, under the above settlement, to sell and give a proper discharge for the purchase-money. There were children of the marriage.

Mr. *Eddis*, for the Plaintiffs:—

The question in this case is whether, the trustees having sold part of the trust funds and invested in the purchase of real estate, that real estate is to be considered as personal estate, so as to enable them to exercise the power of sale. Where the trusts of a settlement require conversion, a trust for re-sale and conversion is implied. In *Master* v. *De Croismar* (1), it was decided that though there were no express trusts to re-sell and convert, yet that lands descending on the wife were bound by the covenant to settle after-acquired property on the trusts of the settlement, and ought to be sold. In that case, Lord *Langdale* said (2), —"It is clear that the benefit cannot be secured at all unless the land be sold, converted into money, and invested. . . . It is said that this can be considered only as a direction to settle real estates on the trusts on which personal estates had before been directed to be held; that it is no trust to sell or convert, and gives no power to sell and convert; and that the Court is not entitled to treat the clause as executory. . . . I cannot view it in that light." So in *Elton* v. *Elton* (No. 2), (3).

Here the real estate to be purchased is to be considered as a security. As to the power to give receipts, that is provided for by 22 & 23 Vict. c. 35, s. 23, though some doubt has been expressed whether that enactment is retrospective. But, independently of the statute, according to the decision of *Doran* v. *Wiltshire* (4), the receipt of the trustees would be a good discharge. On these grounds I submit that the trustees' title is good.

(1) 11 Beav. 184.
(2) 11 Beav. 192.
(3) 27 Beav. 634.
(4) 3 Sw. 699.

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Mr. *Lewin*, for the Defendant, the purchaser:—

I submit that it is doubtful whether the trustees have a power to sell and give receipts, and, as the husband and wife are still living, and there are children of the marriage, the purchaser cannot have the responsibility thrown upon him of seeing to the application of the purchase-money. The real estate purchased by the trustees is directed to be held "upon the trusts that would best correspond" with those before declared. This may imply that the land should be retained *in specie*, and if so, the direction that it should be "treated as personal estate" is void.

Mr. *Eddis*, in reply.

SIR J. ROMILLY, M.R.:—I will look at the case carefully; the more so because both parties wish to come to the same conclusion.

Dec. 16. SIR J. ROMILLY, M.R.:—

In this case I think the trustees have a power to sell. The effect of the settlement is this, that the real estate is to be considered as personalty, and is treated as personalty for the purpose of the settlement. It is therefore not necessary to go further into the question. Declare that the agreement for sale should be specifically performed.

In re GRATWICK'S TRUSTS.

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1865
Nov. 26.

Will—Power—Appointment—Reference to subject of power—Valid exercise.

A testatrix having a life interest in a sum of Consols, with a power of appointing the same among her children, who were to share equally in default of appointment, by her will made in 1864, which contained no reference to the power, bequeathed all money belonging to her in Consols, and all the money that she might die possessed of, to her two surviving children (two having previously died), and to a stranger to the power, in equal shares. The testatrix possessed no Consols or other stock other than that subject to the power.

Held, that the will was a valid exercise of the power as to the two-thirds bequeathed to the surviving children, and that the remaining third went to those entitled in default of appointment.

UNDER articles of agreement made in 1811, on the marriage of *Edward* and *Ann Gratwick*, a sum of money afterwards invested in £635 Consols was directed to be held in trust, in the events that happened, for *Ann Gratwick* for life, and after her decease upon trust for all and every the child and children of *Edward* and *Ann Gratwick*, in such shares as the said *Ann Gratwick* by her will should appoint; and in default of such appointment upon trust for all and every such child or children equally, to vest on their attaining twenty-one or marriage in the lifetime of *Edward* and *Ann Gratwick* or the survivor.

There were four children who attained twenty-one, two of whom died before the year 1864.

Ann Gratwick survived her husband, and by her will, made in 1864, bequeathed all money belonging to her in the Three per Cent. Consols, or in any other stocks or funds of *Great Britain*, with the dividends thereon, and all other money that she might die possessed of or become entitled to in reversion, remainder, or expectancy, unto her son *Thomas Gratwick*, her daughter *Mary Blyth*, and to *Ann Gratwick* the younger, the widow of her son *Edward*, in equal proportions.

The will contained no reference to the power of appointment given to the testatrix by the settlement.

The testatrix was not possessed of any Government stocks or funds at the date of her will or at the time of her death, save so

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far as she was entitled to the life interest in the dividends of the said sum of Consols, the dividends of which she had received, and over which she had the said power of appointment after her decease.

The trust fund had been paid into Court under the *Trustees Relief Act*, and the present Petition was presented by the surviving son and daughter, who claimed to be entitled to two-thirds of the fund.

It was not contested that the bequest of the testatrix to her daughter-in-law, *Ann Gratwick* the younger, was invalid as an exercise of the power of appointment. The main question that was argued was, whether the will operated, as to the two-thirds of the fund, as a due exercise of the power.

Mr. *Hallett* for the Petitioners:—

The will is a good execution of the power as to two-thirds of the stock, the two surviving children being proper objects of the power, *Boyle* v. *Bishop of Peterborough* (1), *Paske* v. *Haselfoot* (2). The testatrix possessed no other stock at the time of her death to which the bequest could relate, except that over which she had a power of appointment. In *Walker* v. *Mackie* (3), a bequest by testatrix of her Bank stock, and of all other property that she was possessed of, was held to be a good execution of a power which she had to appoint certain sums of Three per Cent. Stock, it being proved that the Three per Cent. Stock was the only stock to which she was entitled. So in *Mackinley* v. *Sison* (4), where a testatrix with a power of appointment over a sum of Three per Cents. in the name of trustees, directed certain legacies to be paid out of the moneys invested in her name in the Four per Cents., she having no Four per Cents. standing in her name, and no other money to satisfy the legacies,—this was held to be a due execution of the power. *Elliott* v. *Elliott* (5) was another decision to the same effect. He also referred to *Lake* v. *Currie* (6), *Re David's Trusts* (7), and to the cases collected in *Sugden* on Powers (8).

(1) 1 Ves. Jun. 299.
(2) 11 W. R. 1089.
(3) 4 Russ. 76.
(4) 8 Sim. 561.
(5) 15 Sim. 321.
(6) 2 D. M. & G. 536.
(7) 8 W. R. 39.
(8) 8th ed. 312.

Mr. *W. Barber*, for the trustees.

Mr. *Everitt*, for the representatives of the deceased children entitled in default of appointment :—

The will of the testatrix was not a valid exercise of the power; it was not the will of a married woman, but of a widow, so the Court will not presume that a special power like that contained in the articles was intended to be exercised. Moreover, the bequest is to three persons, one of whom is not an object of the power. In this case there is no direct reference to the power, or to the subject of the power, as in *Evans* v. *Evans* (1), where the will was held not to operate as an execution. A general, roving description of property is not sufficient. The rule is laid down by Vice-Chancellor *Kindersley*, in *Rooke* v. *Rooke* (2). "If you can find evidence of the testator's intention to dispose of the property which is the subject of the power, then the Court will give effect to that intention." Here it is submitted that there is no such evidence, and that no valid appointment has been made.

SIR J. ROMILLY, M.R. :—

This is a case of a special power of appointment given to a testatrix over a sum of stock. The testatrix had, at the time of making her will, and at the time of her death, no stock except the sum of £635 Consols, over which the power of appointment was given to her, and the dividends on which had been regularly paid to her. By her will she bequeaths all the money belonging to her in the Three per Cent. Consols, with the dividends thereon, and all other money that she might die possessed of. The irresistible inference is, that she applied the words to the stock on which she received the dividends. I am of opinion that two-thirds of the fund go to the Petitioners and that the remaining one-third goes in default of appointment, and is divisible in fourths.

(1) 23 Beav. 1. (2) 2 Drew & S. 38, 44.

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YOUNG *v.* SMITH.

Husband and wife—Marriage settlement—After-acquired property—Covenant by husband—Recital, effect of.

A marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled. The corresponding operative part was a covenant by the husband alone, without the usual words, "It is hereby agreed."

Held, that the covenant was not controlled by the recital, and was not binding on the wife.

THIS was the Petition of *Helen St. John*, widow of *Oliver St. John*, for the payment out of Court of her share in the residuary estate of her father *John Young*, the testator in the cause.

A settlement made in 1835, on the marriage of *Oliver* and *Helen St. John*, between *Oliver St. John* of the first part, *Helen St. John* (then *Helen Nutt*, widow) of the second part, and the trustees of the third part, contained the following among other recitals:—

"And whereas it was also agreed upon the treaty for the said intended marriage that in case any property or effects, either real or personal, of the value of £500 at one time should at any time hereafter during the said intended coverture descend or devolve to the said *Helen Nutt* or the said *Oliver St. John* in her right, such property and effects should be settled upon the same or the like trusts as are herein expressed and declared concerning the said trust funds and premises so agreed to be hereby settled as aforesaid."

After the declaration of trust of the settled property the settlement contained the following covenant:—

"And this indenture lastly witnesseth that, in pursuance and further performance of the said agreement, and in consideration of the said intended marriage, he the said *Oliver St. John* doth hereby for himself, his heirs, &c., covenant with the said [trustees], that if at any time or times during the said intended coverture any real or personal estate of the value of £500 at any one time shall descend or devolve to, or vest in the said *Helen Nutt*, or to or in the said *Oliver St. John* in her right, then the said *Oliver St. John*,

his heirs, &c., shall do and execute, or cause or procure to be done and executed, all such acts, &c., which shall be necessary for conveying and assigning the said estate in such manner that the said estate may be vested in the said trustees" upon the trusts before declared of the trust premises.

By the will of *John Young*, the father of *Helen St. John*, who died in 1841, the testator devised and bequeathed his residuary estate to trustees upon trust for his wife for her life, and after her death for his children equally to be vested interests at twenty-one or marriage. The testator's wife died in 1862.

Oliver St. John died in 1844, and his widow, the present Petitioner, claimed to be entitled to a fund in Court, which represented her share under the said will, as not being bound by or subject to the trusts of the settlement, but subject only to her own incumbrances.

The Petition was opposed by the trustee of the settlement.

Mr. *Selwyn*, Q.C., and Mr. *Herbert Smith*, for the Petitioner:—

In this case the Petitioner is entitled to the fund. The operative part of the settlement contained a covenant in the fullest terms by the husband to settle after-acquired property, but none by the intended wife. The words "It is hereby agreed and declared between and by the parties to these presents" being omitted, the wife is not expressly bound. Even if the recital can be coupled with the covenant it would only amount to an agreement that the husband should do certain acts, and would be only binding on him.

Thus in *Ramsden* v. *Smith* (1), where the covenant by the husband was prefaced by the words, "It is hereby agreed and declared," Vice-Chancellor *Kindersley* observed respecting those words:—"They operate to shew that what is comprised in the clause, of which these words are the commencement, is what all parties intend and agree shall be done; and whatever you find in the clause as agreed to be done by any given party, it is an agreement that that party is to do it; but the party who is to do the thing is the person who is alone bound to perform that agreement." So in *Reid* v. *Kenrick* (2) and *Grey* v. *Stuart* (3), which were similar cases of covenant by

(1) 2 Drew. 298. (2) 1 Jur. N. S. 897. (3) 2 Giff. 398.

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the husband, Vice-Chancellor *Stuart* held that he alone was bound.

Mr. *Jessel*, Q.C., for incumbrancers in the same interest as the Petitioner:—

Taking the covenant with the recital, the object was to exclude the husband's marital right; this could not affect an interest of the wife's that was reversionary during the whole period of coverture. This fund did not "descend to or devolve on" the wife during the husband's life. He could not "do" anything or "cause or procure" anything "to be done" to vest this fund in the trustees. Where there is a vague recital and an explicit witnessing part, the latter cannot be controlled by the recital.

Mr. *Baggallay*, Q.C., for the surviving trustee of the settlement, in the interest of an infant:—

It is admitted that where a recital and an operative part are at variance, the operative part must prevail, but here the covenant is merely ancillary to the recital, and the terms of the recital are as much binding on both parties as if repeated in the operative part. The case is governed by *Butcher* v. *Butcher* (1), where the covenant by the husband comprised property that should "come to or vest in" the wife, and the wife was held bound to settle a reversionary interest that fell into possession after the death of the husband. He also referred to *Hammond* v. *Hammond* (2).

[The MASTER OF THE ROLLS referred to *Moore* v. *Magrath* (3).]

Mr. *Archibald Smith* on the same side:—

1. The recital and the covenant taken together amount to a covenant on the part of the wife as well as of the husband, *Holles* v. *Carr* (4). 2. A clear recital of a general intention, followed by a mistaken and imperfect way of carrying it into effect, amounts to an agreement to which the Court will give effect. 3. The recital is, at all events, conclusive evidence of an agreement existing at the time of the settlement, and not superseded by it.

(1) 14 Beav. 222.
(2) 19 Beav. 29.
(3) Cowp. 9.
(4) 2 Freem. 3; s. c. 3 Sw. 638

SIR J. ROMILLY, M.R.:—

I am of opinion that Mr. *Selwyn's* client is entitled to an order for the transfer of the fund. It is of the greatest consequence to keep distinct the different parts of deeds, and to give to recitals and to the operative part their proper effects. I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be officious and the recitals inofficious. I do not say inoperative, for the recitals may be useful in explaining ambiguities, but I cannot give to them such effect as to introduce a new covenant into the deed. I consider that very dangerous consequences would follow if I were to introduce here a covenant by the lady to settle her after-acquired property, especially when it is remembered that recitals in deeds are often very loosely expressed.

I agree with much that has been said in argument as to the Court giving effect to the intention of the parties; but I consider that where the settlement is not in accordance with that intention the proper course to be taken is to file a bill to reform it; and then the recitals may be used as evidence to shew what the intention of the parties was.

In this case the recital contains a statement that whatever devolves on the wife during the coverture, or upon the husband in her right, shall be settled in the same manner as the other property comprised in the settlement; but when we come to the covenant, we find that it is by the husband alone. I am asked to extend the covenant so as to make it correspond with the recital; but I do not know upon what principle I can control the operative part so as to extend it, if I cannot also control it so as to restrict it. If I did what I am asked to do, I should introduce a new covenant into the deed; but this would be a proceeding wholly unwarranted by authority. In *Butcher* v. *Butcher* (1), the agreement was in the operative part of the deed, and I gave effect to it; and I should have done so here, but the circumstance that the agreement is contained in the recital sufficiently distinguishes the two cases. I also think that the case of *Holles* v. *Carr* (2), before Lord *Nottingham*, is distinguishable from the present. In that

(1) 14 Beav. 222. (2) 2 Freem. 3; s. c. 3 Sw. 638.

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case the deed would have been wholly inoperative as to the land comprised in it, if it had contained no covenant to levy a fine; and I have no doubt that where the intention is clearly expressed, the Court will hold the parties bound to do all things necessary to carry out the intention.

I am therefore of opinion that, notwithstanding the useful operation of recitals in deeds in explaining ambiguities, or in cutting down the parcels as in *Moore* v. *Magrath* (1), before Lord *Mansfield*, I cannot introduce into this settlement a covenant by the wife to settle her after-acquired property.

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YEOMANS *v.* WILLIAMS.

Release—Covenant—Voluntary agreement—Representation.

A voluntary declaration by a creditor that he intends to release his debtor from a debt, though not amounting to a release at law, may nevertheless be held in equity to be a representation which the creditor is bound to make good.

Where, therefore, a mortgagee, on hearing that his son-in-law, the mortgagor, was about to sell the mortgaged property (a house occupied by the mortgagor) in order to pay off the debt, wrote that he might continue to live there without paying any rent, it was held that the mortgagor was entitled to redeem, on paying the principal, together with interest from the last day on which interest fell due, previously to the death of the mortgagor.

Cross v. *Sprigg* (1) commented on.

JOHN CHRISTOPHER YEOMANS, being owner in fee of a freehold house which he occupied himself, mortgaged the same, in the year 1855, to his father-in-law, *James Richards*, to secure £1000 and interest. The mortgage-deed contained the usual covenants for the payment of principal and interest.

After the mortgage, Mr. *Yeomans* continued to occupy the house; and he never paid any interest on the debt. About May, 1862, a slight quarrel took place between Mr. *Yeomans* and Mr. *Richards*, and thereupon the former threatened to sell his house in order to pay off the debt. On hearing of this, Mr. and Mrs. *Richards* sent a letter to their daughter, Mrs. *Yeomans*, dated

(1) Cowp. 9.

the 2nd of May, 1862, of which the following is the material part:—

"You wrote to tell me you should sell your house to pay your * * (1) Did I ever ask you to do it, or have you paid me a penny since you had the money from me, or ever took the least notice about it? You can remain where you are. You cannot sell the house, and I hold the deeds. You can live there just as you do, without paying us any rent. It is not wished that you should give it up. If you give it up you must get some place, and that you must pay for." . . .

Mr. *Richards* died on the 21st of September, 1862, having by his will bequeathed his residuary personal estate to the Defendants upon certain trusts, and appointed them his executors.

The bill was filed by Mr. and Mrs. *Yeomans* (the latter of whom was interested in the property under a postnuptial settlement), and prayed for redemption on payment of the principal, together with interest from the death of Mr. *Richards*.

Mr. *Baggallay*, Q.C., and Mr. *W. R. Fisher*, for the Plaintiffs, contended that the letter of the 2nd of May, 1862, was in equity a release of the interest during the life of Mr. *Richards*.

Mr. *F. O. Haynes*, for the Defendants, submitted that a mere voluntary declaration of intention, not under seal, could not amount to a release of a covenant, *Cross* v. *Sprigg* (2). Even if it were a release, it could only operate as such up to the time when it was written.

SIR J. ROMILLY, M.R.:—

I am of opinion that the Plaintiffs are entitled to redeem on payment of the principal, and interest thereon from the last day previous to the death of the testator, on which interest fell due. I do not understand it to be laid down in the case before Vice-Chancellor *Wigram*, that a man may not let his house to his son-in-law, and at the same time say to him, "You may hold it rent free." Is there anything contrary to equity in this? and is there any technical rule that, as this

(1) *Sic.* (2) 6 Hare, 552.

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would not release the son-in-law from the rent at law, it would not do so in equity? I think not. I think the case would come under another head of equity, namely, that where one man induces another to enter upon a certain course of action upon the faith of representations held out by him, he shall be compelled to make such representations good. Thus, if a man asks his son-in-law to take a house, and the latter says he is not rich enough, and the father-in-law then says that the son-in-law shall hold it rent free, or, what is the same thing, that the father-in-law will pay the rent for him, I think that if the son-in-law acted on such representations the Court would compel the father-in-law to make them good. Moreover, the Vice-Chancellor suggests at the end of his judgment that there may be a difference between the case of a release of principal and of interest. He does not decide the point; but I am of opinion that there is some substance in the distinction; for where the principal is alleged to be released, the transaction is always open to the observation—Why did not the creditor deliver up his security? Here only the interest is released, and I think the Plaintiff is entitled to the decree I have already stated.

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DENT *v.* DENT.

Practice—Production of Documents

In an administration suit an order was made, on the application of the Defendants, the trustees of the will, that a contract made by them before the institution of the suit for the sale of part of the testator's estate should be carried into effect, the purchaser consenting to be bound by the order, "as if he were a party to the suit, and the contract were specially the subject thereof." The purchaser having made an application, which was opposed by the trustees, for the reduction of the purchase-money on the ground of adverse claims to part of the property:—

Held, that he was entitled to an affidavit by the trustees as to documents in their possession relating to the matters in question between him and them.

THIS was a summons adjourned from Chambers for an affidavit as to documents.

On the 18th of May, 1861, the applicant, *John Bird*, entered into a contract with *Wilkinson Dent*, *William Dent*, and *Arthur*

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Elley Finch, the trustees of the will of *Elizabeth Dent*, for the purchase of an estate in *Venezuela*, part of the testatrix's estate. This suit was afterwards instituted by *Wilkinson Dent* against his co-trustees and others for the administration of the estate of *Elizabeth Dent*, and on the 8th of December, 1862, an order was made in the suit upon the application of the Defendants *William Dent* and *Finch* that the contract of May, 1861, should be carried into effect. *Bird* appeared and consented to this order, which stated his consent in these terms:—"The said *John Bird* by his solicitor consenting and submitting to be bound by this order or by any other order that may be made, as if he was a party to this cause, and the said contract was specially the subject thereof."

Bird having taken out a summons for compensation to be made to him out of the purchase-money by reason of adverse claims on parts of the purchased estate, the Defendant *Finch*, in an affidavit made by him in opposition to that application, stated that the documents and correspondence in the possession of the trustees relating to the estate in *Venezuela* were exceedingly voluminous, and that a great many of the said documents and correspondence had not been personally read or examined by him.

Bird then took out the present summons, that the Plaintiff and the Defendants *William Dent* and *Finch* might make the usual affidavit as to the documents in their possession relating to the matters in question between them and the applicant in the suit, and for the production of the documents.

Mr. *Southgate*, Q.C., and Mr. *Druce* (with them Mr. *Prendergast*), for the applicant:—

The order of the 8th of December, 1862, has placed the applicant in the position of a party to a suit between vendor and purchaser relating to the contract; he is therefore entitled to the same discovery as if he had filed a bill.

Mr. *E. K. Karslake*, for the Respondents:—

A person who is not a party to the suit cannot obtain production of documents; the application is merely for the purpose of delaying the hearing of the summons for compensation.

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SIR J. ROMILLY, M.R.:—

The applicant is entitled to the affidavit. The respondents themselves obtained the order by which the applicant consented to be treated as a party to the suit, and they cannot now turn round and object to give him the discovery he asks on the ground that he has not filed a bill.

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IBBOTSON *v.* ELAM.

Partnership—Profits—Interest—Income—Apportionment.

Partnership articles provided that the partnership should continue for five years notwithstanding the death of any partner before the expiration of the term, that the profits should be divided annually, and that before any division of profits each partner should, at the end of each year, be credited with interest at five per cent. on his capital in the business at the beginning of the year. One of the partners died before the expiration of the five years.

Held, that the whole of the share of the deceased partner of the profits divided at the annual division next after his death was income of his estate, but that the interest on his share of capital was apportionable, and so much of such interest as accrued in his lifetime was *corpus*, and the remainder income of his estate.

THIS was a special case, in which the Plaintiff was the widow, and the Defendants were the executors and trustees of the will, and the children, of *William Frederick Ibbotson*.

On the 11th of January, 1860, *Mary Ibbotson*, *William Frederick Ibbotson*, and *Alfred Buckingham Ibbotson*, having carried on business in partnership since the beginning of the year 1853, signed two memoranda of agreement, the first of which, after providing that the profits of the business for the seven years ending the 31st of December, 1859, should be divided between the partners in certain proportions, proceeded as follows:—"It is further agreed that the balance now in the business to the credit of each of us on the above arrangement shall remain in the said business, and that a new partnership is now formed between us beginning on the 2nd of January, 1860, and ending the 31st of

December, 1864, which is to continue in force for the whole of the five years, even though any of us die before the expiration of the said term, on the following principle:" — Then followed five clauses, of which the first provided for the payment of a salary to *William Frederick Ibbotson*, and, in the event of his death, to *Alfred Buckingham Ibbotson;* the third and fourth were immaterial to the present case, and the second and fifth were as follows:—

"Secondly. Before any division of the profits, each partner shall, at the end of each year, be duly credited with interest at the rate of 5 per cent. upon the amount of capital he or she possessed in the business at the beginning of each year.

"Fifthly. After the first and second parts of this agreement are carried out, the profits of the business shall be annually divided in equal proportions between the said partners."

The second memorandum provided that, in the event of the death of any partner or partners before the expiration of the term, it should be left to arbitration to decide at the end of the term what time should be given to the surviving partners or partner for the payment of the capital of the deceased partner or partners, and that the goodwill should, at the expiration of the partnership, belong exclusively to the surviving partners or partner.

William Frederick Ibbotson by his will, dated the 2nd of December, 1863, after appointing *Charles Elam* and *Alfred Buckingham Ibbotson* executors and trustees of his will, and directing payment of his debts and funeral and testamentary expenses, and giving certain specific legacies, devised and bequeathed all his real leasehold and residuary personal estate to *Charles Elam* and *Alfred Buckingham Ibbotson*, their heirs, executors, administrators, and assigns, upon trust as soon as conveniently might be after his decease to sell his real and leasehold estates, and to sell, convert, and get in his residuary personal estate, and invest the produce conformably to the clauses for the investment of moneys thereinafter contained. The will then proceeded as follows:—"And I direct that my trustees shall (subject to any advance that may be made to my children pursuant to the clause in that behalf hereinafter contained) permit my wife, she continuing my widow, to

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receive, from my death, the net annual income actually produced by my trust property howsoever constituted or invested;" and after directing that the testator's widow should maintain his children during their minority out of the income so to be received by her, and providing for certain advances to be made to the children, proceeded to direct that, "subject to the preceding directions," the trustees should hold the testator's trust property upon certain trusts for the benefit of his children and their issue, and in default of children or issue attaining a vested interest, in trust for his statutory next of kin at the time of the failure of the prior objects of the trust. The trusts were followed by a clause directing that all investments of money thereinbefore authorized or directed to be made by the trustees should be made in their names in the public stocks or funds, or in Government, real, or leasehold securities, or in bonds, debenture stock, or preference stock of railway or canal companies.

William Frederick Ibbotson died on the 26th of March, 1864, leaving his wife and three children surviving. After his death the business was carried on by the surviving partners in conjunction with *Elam*, as one of his executors, until the 31st of December, 1864.

During the partnership, stock was taken, and statements of accounts and balance sheets were made out annually, showing the interests of the respective partners up to the 1st of July in each year. Such stock-takings were made on the 1st of July, 1863, the 1st of July, 1864, and finally on the winding up of the partnership on the 31st of December, 1864.

Doubts being raised as to the rights of parties under the will of *William Frederick Ibbotson* in respect of his share in the profits of the business from the 1st of July, 1863, to the 31st of December, 1864, and the interest on his capital during the same period, the following questions were submitted to the Court by the special case:—

1. Whether the Plaintiff is entitled, for her own benefit, to receive the whole, or any, and what part, of the profits accrued on account of the testator's share from the 1st of July, 1863, up to the 26th of March, 1864, from the last-mentioned day up to the 1st of July, 1864, and from the last-mentioned day up to the 31st

of December, 1864, or how the executors ought to apply the same sums when received by them?

2. Whether the Plaintiff is entitled, for her own benefit, to receive the whole, or any, and what part, of the interest accrued due to the share of the testator between the same respective periods, or how the executors ought to apply the same when received by them?

Mr. *Selwyn*, Q.C., and Mr. *Marten*, for the Plaintiff:—

The express words of the will, coupled with the fact that the testator had agreed that his capital should remain in the business until the expiration of the partnership term, show that the testator intended the Plaintiff to receive the specific produce of the capital embarked in the business.

The whole of the profits of the testator's share since the 1st of July, 1863, and of the interest on his share of the capital since that day, are income produced since his death: *Bates* v. *Mackinley* (1); *Maclaren* v. *Stainton* (2).

The profits cannot be considered to have accrued due until they are declared at the annual stock-taking; and it cannot be ascertained what amount of profits would have been divided, if the partners had taken the account at the testator's death. Interest, as a general rule, is apportionable; but, in this case, by the terms of the partnership agreement, it is made a part of and must follow the same rule as the profits.

Mr. *Hobhouse*, Q.C., and Mr. *T. Terrell*, for the Defendants:—

The trust for conversion overrides all the beneficial trusts in the will. Therefore, although the testator's share in the partnership could not in fact be converted into money till the expiration of the term, the Plaintiff is only entitled to the income which it would have produced if converted, according to the rule in *Howe* v. *Dartmouth* (3).

The profits and interest which accrued in the testator's lifetime are part of the *corpus* of his estate: *Johnston* v. *Moore* (4).

(1) 31 Beav. 280.
(2) 3 D. F. & J. 262.
(3) 7 Ves. 137.
(4) 27 L. J. (Ch.) 453.

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Profits accrue *de die in diem*, though for the sake of convenience the accounts are taken and a division made at stated periods. If the books do not shew the exact amount of profits made up to the testator's death, an average must be struck.

Bates v. *Mackinley* (1) was the case of a shareholder in a company, who has no interest in the profits until a dividend is actually declared. In *Maclaren* v. *Stainton* (2) the sum held to be income was so held, as being a debt due to the partnership, and therefore part of the profits of the year in which it was paid. The profits and interest up to the testator's death would have to be included in the return of the testator's estate for the purpose of assessing probate duty.

The MASTER OF THE ROLLS:—I think that the case is not within the rule in *Howe* v. *Lord Dartmouth* (3).

Mr. *Selwyn*, in reply:—

There is no rule of law or equity that profits, to be ascertained and divided at stated periods, can be apportioned. In *Johnston* v. *Moore* (4) the Vice-Chancellor did not apportion the profits; it is not clear whether he gave the tenant for life all or none of the profits at the stock-taking next after the testator's death; if all, the case is in favour of the present Plaintiff; if none, he must have decided the case upon the special terms of the articles of partnership.

SIR J. ROMILLY, M.R.:—

The testator in this case was engaged, with his mother and brother, in a partnership, the profits of which were ascertained and divided on the 1st of July in each year, and the capital of each partner was in any event to remain in the business until the expiration of the partnership term on the 31st of December, 1864. The testator died on the 26th of March, 1864. The first question in the case is, whether his widow is entitled to the whole of the profits of his share since the 1st of July, 1863, the day of the last annual division of profits preceding his death, or whether there is

(1) 31 Beav. 280. (3) 7 Ves. 137.
(2) 3 D. F. & J. 202. (4) 27 L. J. (Ch.) 453.

to be some sort of apportionment of the profits, and the widow is entitled only to such profits as were made after the testator's death.

The second question is, whether the widow is entitled to the whole of the interest on the testator's capital in the business from the 1st of July, 1863, or only to so much of the interest as accrued after his death. Both questions depend partly on the articles of partnership and partly on the testator's will.

(His Honour read the material clauses of these documents.)

The first question raised in the argument was, whether the trust in the will for conversion and investment must not be read as preceding the trust for the benefit of the widow. But I am of opinion that the will cannot be so construed; because the testator directs that the widow shall receive the actual income from his death, and the getting in and conversion of the assets would necessarily take some considerable time.

Then comes the question of the apportionment of profits. I am of opinion that there can be no apportionment, and that the widow is entitled to the whole of the profits made after the 1st of July, 1863. The articles provide that the profits shall be ascertained and divided on the 1st of July in each year; and the business has been carried on upon that footing. If the accounts were to be taken and the profits ascertained and divided at the time of the testator's death instead of at the time for the annual division under the articles, it is obvious that very different results might have been produced. Debts might have been treated as good debts on the 26th of March, which by the 1st of July might have turned out bad, or *vice versâ*, and the market value of the stock in trade might, between those days, have been materially increased or diminished by external circumstances. It is clear that as between the testator and his partners the profits could not be ascertained at any other time than the 1st of July, and I do not think that they can be ascertained at any other time for the purpose of adding to or taking away from the capital or income of his estate. If I were to make the apportionment I might be deciding that the testator's estate was, in March, 1864, entitled to a share of profits exceeding the share of the profits for the whole year, as ascertained on the 1st of July, 1864. I concur,

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therefore, in the argument that the whole of the profits must be considered as accruing at the time when under the articles they were to be ascertained and divided, and that they are consequently income of the testator's estate, and payable to the widow. I think, also, though of course in the absence of the Attorney-General I merely make the observation in reference to the argument of the Defendant's counsel, that no part of these profits would be properly included in the return of the testator's estate for the purpose of assessing probate duty.

With regard to the interest, however, the case is different. Interest accrues *de die in diem*, and there is no uncertainty as to the amount of interest which has accrued up to any given day. Whatever was the state of the business the interest was a fixed and ascertainable sum independent of the profits. I think, therefore, that the interest must be apportioned, and that so much as accrued in the testator's lifetime is part of the *corpus* of his estate. I entirely concur in the reasoning of Vice-Chancellor *Wood*, in *Johnston* v. *Moore* (1), who decided this question in the same way. The report of the case is a little obscure upon the other question—the question of profits; but probably the decision turned upon the terms of the particular instruments in that case.

The answer to the first question will be that the Plaintiff is entitled to receive the whole of the profits accrued on account of the testator's share from the 1st of July, 1863, to the 31st of December, 1864; and the answer to the second question will be that the Plaintiff is entitled to receive the interest which accrued due on the testator's share from the 26th of March, 1864, to the 31st of December, 1864.

(1) 27 L. J. (Ch.) 453.

WALKER *v.* WARE, HADHAM, AND BUNTINGFORD RAILWAY COMPANY.

M. R. 1865 Dec. 4.

Railway Company—Vendor's lien—Compensation—Sale of Railways—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18).

The owner of land, of which a railway company has taken possession, either under the 85th section of the *Lands Clauses Consolidation Act*, or by agreement, has a lien on the land for the purchase-money, and also for the money payable to him as compensation for damage by severance and injury to his adjoining land, unless such compensation is the subject of a separate agreement between him and the company. He is not deprived of such lien by a deposit and bond under the 85th section, or by accepting a deposit in the names of trustees in lieu of the statutory deposit, if the purchase and compensation moneys exceed the deposited sum.

The Court of Chancery will enforce the lien by sale, although the railway has been made over the land, and opened for public use.

ON the 12th of October, 1861, *The Ware, Hadham & Buntingford Railway Company* took possession, under the 85th section of the *Lands Clauses Act*, of land of which *James Sydney Walker*, the Plaintiff, was the fee-simple owner, and paid into the bank £700, the price at which the land had been valued by their surveyor, and gave the Plaintiff a bond for the purchase-money or compensation, to be paid him in respect of the land.

The company shortly afterwards required other land belonging to the Plaintiff, and it was agreed that the purchase-money, or compensation, to be paid for this land, as well as the land previously taken, should be settled by a surveyor, that the company should have immediate possession of the additional land, and that instead of payment into the bank, under the 85th section, they should deposit £500, in a bank in the names of *Mickley*, their secretary, and *Heard*, a nominee of the Plaintiff, by way of security for the amount to be paid by them in respect of the additional land. The company deposited £300, in February, 1862, and £200, in July, 1862, and took possession of the land. The railway was completed and opened for public use in 1863.

On the 31st of December, 1863, an agreement as to the whole of the land to the following effect was signed by the Plaintiff, and sealed with the company's seal.

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That the Plaintiff should sell and the company should purchase the land at such a sum as Mr. *Clutton*, a surveyor, should determine. That the company should, in addition to the purchase-money, pay to the Plaintiff such a sum as Mr. *Clutton* should determine as a compensation for the damage to be sustained by him, by reason of the severance of the land, or by reason of his other lands being injuriously affected by the making and execution of the railway. That the Plaintiff should deduce a good title, and upon payment of the sums so to be determined convey the land to the company. That the company should pay interest at 5 per cent. on the purchase and compensation moneys from the days when they took possession to the day of completion of the purchase, and that the company should pay all the Plaintiff's costs and expenses.

Mr. *Clutton* made his award on the 18th of April, 1864, and thereby awarded £725 as the sum to be paid to the Plaintiff for the purchase of the land, and £1100 as the sum to be paid to him as compensation for damage arising from severance, &c.

The Plaintiff took up the award and paid the expenses of the reference. His title was accepted by the company, and a conveyance, prepared by their solicitor, was executed by the Plaintiff, but was retained by him and was still in his possession.

The company having failed to pay the purchase and compensation moneys, the Plaintiff brought an action against them on the agreement and award, in which he recovered judgment on the 21st of December, 1864, for £2289 18*s.* 6*d.*, and £45 7*s.* 10*d.* costs.

On the 25th of January, 1865, the Plaintiff filed his bill against the company, *Mickley* and *Heard*, praying for a specific performance of the agreement of the 31st of December, 1863, for payment of the £700 and £500, in part discharge of the moneys payable to him under the agreement, award, and judgment, for a declaration that the Plaintiff had a lien as unpaid vendor on the land for such moneys, or for so much thereof as should not otherwise be paid by the company, for enforcement of the lien (if necessary) by sale of the lands or otherwise, for an injunction to restrain the company until payment from continuing in possession of or interfering with the land, or, at all events, the land taken in 1862, and for a receiver.

The company by their answer stated, that there was not as yet sufficient revenue arising from the line to enable them to satisfy the Plaintiff's claim. They also stated that they had on the 29th of June, 1863, made an agreement with the *Great Eastern Railway Company* by which the latter were to work and maintain their line and to pay them 50 per cent. of the gross receipts. They had also borrowed a considerable sum on debentures, the interest on which had been guaranteed by the *Great Eastern Company*, in pursuance of a power in one of their Acts.

The Plaintiff then made the *Great Eastern Company* parties by amendment.

After the bill was filed the Defendants allowed the £700 and £500, with the interest thereon, to be paid to the Plaintiff. The cause now came on upon motion for decree.

Mr. *Selwyn*, Q.C. (with him Mr. *Druce*), for the Plaintiff :—

The Plaintiff is entitled to the ordinary vendor's lien for the balance of the purchase and compensation moneys, and to have his lien enforced by a sale of the land. The *Great Eastern Company's* interest is subject to the lien of the Plaintiff.

Mr. *F. H. Colt*, for *Heard*, the depositee.

Mr. *Kaye*, for the other defendants :—

The Legislature having provided special remedies for persons, whose land is taken by railway companies, has deprived them of the lien which arises by implication out of ordinary contracts for the sale of land; *Adams* v. *The Blackwall Railway Company* (1). The purpose for which the land is required is inconsistent with the existence of a lien, the enforcement of which would affect the rights of the public, especially after the railway is actually in use; *Wood* v. *The Charing Cross Railway Company* (2).

The deposit under the 85th section is a substitute for the lien, and the Plaintiff's acceptance of the deposit of £500 as security for the amount to be paid in respect of the land taken in 1862, was a waiver of his lien on that land; *Nairn* v. *Prowse* (3).

The deposited sums which have been paid to the Plaintiff exceed the sum awarded as the price of the land, and there can

(1) 2 Mac. & G. 118. (2) 33 Beav. 290. (3) 6 Ves. 752.

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be no lien for the compensation money, that being something totally distinct from the purchase-money; *Webb* v. *the Direct Portsmouth Railway Company* (1); *Doherty* v. *the Waterford & Limerick Railway Company* (2).

The *Great Eastern Company* are purchasers for value without notice of the Plaintiff's claim. The Court will not make the decree sought in the absence of the debenture holders; *Furness* v. *the Caterham Railway Company* (3).

The judgment not being a year old cannot be made a charge on the land, and the Plaintiff cannot add the costs of the action to his lien, if any.

The MASTER OF THE ROLLS in the course of the argument intimated that he should not grant an injunction or appoint a receiver.

SIR J. ROMILLY, M.R.:—

I am of opinion that the Plaintiff is entitled to a part of the relief which he asks.

In the first place, I think that no distinction can be made between the money to be paid to him for the price of the land and the money to be paid by way of compensation for severance and other injury. If a company agree to take a piece of land and to give £200 for it, treating £100 as the value of the land and £100 as compensation for injury to other land, the whole £200 is in truth the purchase-money; and it is the same thing when the amount is ascertained by the award of an arbitrator, and the award apportions the amount between the value of the land and the compensation for injury. If there had been two distinct agreements, one for the sale of the land at a certain price, and the other for compensation in respect of other matters which might not have been thought of at the time of the first agreement, the two sums would have been separate and distinct; but here there is one agreement for the price of the land to be made up of two ingredients, and the owner of the land is in my opinion entitled to the ordinary vendor's lien for the whole. Indeed it would be a matter of insuperable difficulty in many cases to separate the

(1) 9 Hare, 129, 139. (2) 13 Ir. Eq. Rep. 538. (3) 25 Beav. 614.

4 Jur. N.S. 1213.

different ingredients which combine in the mind of a vendor in guiding him as to the price which he will accept for the sale of his land; not only the actual productive value of the land, but the convenience of its position with reference to other lands, and other matters of that nature have to be taken into consideration for that purpose.

In the next place I think that the Act of Parliament does not deprive the Plaintiff of his lien. It was not intended, that because power was given to railway companies to take possession of land upon paying into the bank the amount of the valuation of a surveyor and giving the bond required by the Act, the landowner should lose his ordinary right of lien when the amount payable by the company has been subsequently ascertained, and is found to exceed the deposited sum.

The next question is whether the Plaintiff has waived his lien by accepting security. It appears that a sum of money was deposited in respect of each of the pieces of land; but there was no agreement that these sums were to be taken to be the value of the land; the deposit was merely with the view of securing at all events so much of the purchase-money which was afterwards to be ascertained, and that cannot in my opinion be considered identical with or analogous to the case of a vendor taking security for an ascertained amount of purchase-money, in which case no doubt he would lose his lien on the land. A vendor's lien is an inherent equitable right, which can only be taken away by Act of Parliament or by agreement, express or implied, and in neither of these ways has the present Plaintiff, in my opinion, lost his right.

Then it is said the enforcement of the lien would interfere with the rights of the public. Now, I admit that the rights of the public are to be considered; but can it be said that a railway company may take a man's land without paying for it, and when he seeks to enforce payment of the purchase-money, may set up as a defence the right of the public? I know of no authority for such a contention, and I certainly will not be the first to sanction it. The public, in my opinion, cannot be interested in having a man deprived of his property. With regard to the agreement which has been made with the *Great Eastern Railway Company*, and to the rights of the bondholders of the *Ware*,

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Hadham, & Buntingford Company, the latter company could only enter into such agreement and confer such rights subject to the rights which previously affected their own interest in the land, and therefore subject to the Plaintiff's lien. With respect to the costs of the action I shall say nothing. I shall declare the lien and refer it to Chambers to ascertain what is due to the Plaintiff for principal, interest, and costs; and if the Defendants object to any part of the amount claimed, the objection can be raised in Chambers. A day must be fixed for the payment of what shall be found due, and in default of payment, there must be a sale of the land. The Plaintiff must pay the costs of Mr. *Heard* and add them to his own costs.

M. R. 1865 Dec. 13.

CLEMENTS *v.* WELLES.

Lease—Assignment—Covenant—Notice—Specific Performance—Pleading—Parties.

The underlessee of a person who has covenanted not to carry on a particular trade on the demised property, will be restrained from carrying it on, although such covenant was not contained in the original lease, but only in an assignment thereof; and although the underlessee had no actual notice of it when he took his underlease; and, *semble*, even though he had no constructive notice. So also as to an assignee of the underlessee.

To a suit to enforce such a covenant, the original covenantor is not a proper party, if he has parted with all his interest in the property and is not any way in fault.

THE Plaintiff was a hairdresser in *Titchbourne Street, Haymarket*, and formerly carried on business at No. 19, *Leicester Street*, a house which he held under a lease, dated the 21st of May, 1857, for a term of twenty-one years from the 25th of December, 1856.

By an indenture dated the 1st of June, 1860, the Plaintiff assigned all his interest in the premises, No. 19, *Leicester Street*, to the Defendant *Welles*, who thereby covenanted with the Plaintiff that he, his executors, administrators, or assigns, or under-tenants, would not, during the residue of the term, carry on on the premises thereby assigned the trade or business of a hairdresser.

By an indenture dated the 6th of June, 1860, *Welles* demised the same premises to one *Ghio*, for a term of seventeen years, one half of another year and thirteen days from the 1st of June, then instant, at the rent therein mentioned, and subject to a covenant (amongst others) by *Ghio*, that he, his executors, administrators, or assigns, would not, without the previous consent in writing of *Welles*, his executors, administrators, or assigns, carry on upon the premises thereby demised, any trade or business except that of a tailor. This deed contained nothing to shew the nature of *Welles's* title.

On the 29th of November, 1861, *Welles* assigned all his interest in the premises to *W. H. Hall.*

Ghio afterwards assigned his interest in the premises to one *Devick;* and on the 7th of April, 1865, *Devick* entered into an agreement with the Defendant *Sheat* for the sale of the premises to him for the residue of the term created by the lease of the 6th of June, 1860. The agreement provided that the purchaser should not require the production of any title to the premises anterior to such lease, nor any evidence of the lessor's power to grant the same.

Sheat's object in purchasing the premises was to carry on the business of a hairdresser there; and upon investigating the title, his solicitors required the vendor to procure the written consent of *Welles* for that purpose. Thereupon, he was furnished with a document dated the 24th of April, 1865, and signed by *W. H. Hall*, by which, after reciting that *Welles* had assigned all his interest in the premises to *Hall*, by an indenture dated the 29th of November, 1861, the latter gave his consent to *Devick*, or his under-tenants, or assigns, carrying on upon the premises the business of a hairdresser and perfumer. Shortly afterwards, *Devick* executed an assignment of the premises to *Sheat*, who immediately entered into possession, and began to fit them up for the purposes of his business. On the 10th of May, 1865, the bill was filed against *Welles* and *Sheat*, praying that they might be decreed specifically to perform the covenant in the indenture of the 1st of June, 1860, and might be restrained from doing any act contrary thereto.

An interlocutory injunction had been obtained, and the cause now came on to be heard.

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It was admitted that *Sheat* had no express notice of the covenant in question, until the day before the bill was filed.

Mr. *Baggallay*, Q.C., and Mr. *T. H. Terrell*, submitted that as to *Sheat*, the case was governed by those of *Parker* v. *Whyte* (1); *Robson* v. *Flight* (2). As to *Welles*, he was a necessary party to a suit for specific performance of the covenant, and besides, he had come under a personal liability, of which it was impossible for him to get rid.

The MASTER OF THE ROLLS:—*Welles* has parted with all his interest; and has no control over his assignee. Suppose I grant an injunction: do you mean that I could commit him if his assignee persisted in breaking the covenant?

Mr. *Terrell*:—It is submitted that he cannot get rid of his liability.

The MASTER OF THE ROLLS:—You may recover such damages from him as you can at law.

Mr. *Southgate*, Q.C., and Mr. *Simmonds*, for *Sheat*:—

This case is entirely distinguishable from all which have preceded it. *Sheat* is not a purchaser with notice of the covenant as was the Defendant in *Tulk* v. *Moxhay* (3). The covenant in *Parker* v. *Whyte* (1), was in the original lease, and, therefore, ran with the land; here it is contained in a mesne assignment, and does not (4). An injunction cannot be granted unless *Sheat* can be shewn to have had some notice, actual or constructive, of the covenant; *Flight* v. *Barton* (5).

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for *Welles*, were not called upon.

SIR JOHN ROMILLY, M.R.:—

As to *Sheat*, the Plaintiff is entitled to a perpetual injunction. If not, observe what the consequences would be. A man makes a

(1) 1 H. & M. 167.
(2) 5 N. R. 154, 344.
(3) 2 Ph. 774.
(4) 1 Sm. L. C. 74.
(5) 3 My. & K. 282.

34 Beav 110

11 SC 10 Jur NS 1228

lease of a large piece of land to a builder; the builder erects buildings on it, and then assigns, making the assignee covenant not to carry on any noxious trade—as, for example, that of a soap-boiler—which would be injurious to the neighbourhood. It is contended that the assignee may grant an underlease, free from this covenant, to a person who may immediately afterwards set up this very trade to the injury of the whole neighbourhood. And this is a mischief which cannot be guarded against, if this be a true statement of the law. I am of opinion, however, that an underlessee cannot be put in any other position than he would be in if he had distinct notice of the original covenant.

In the present case, no doubt, this presses very hard upon *Sheat*, who acted quite fairly; but independently of what I have said, he had constructive notice of the covenant. He makes application to *Hall* for licence to carry on the trade of a hairdresser. *Hall* writes a letter in reply, in which he refers to the indenture of the 29th of November, 1861. That indenture is an assignment of the interest of *Welles*, in the deed creating which, the covenant in question is contained. *Sheat*, therefore, cannot say that he is at liberty to carry on this trade, notwithstanding the original covenant.

There is no case at all against *Welles*; it does not appear that he is any way in fault. All he has done is to grant an under-lease of the property, and then assign it; afterwards his assignee gives leave to carry on a trade which the assignor covenanted not to carry on, and so causes all this mischief. If the assignee had been here, it might have been a question whether he ought not to be made to pay all the costs of the suit; but as the case now stands, the bill must be dismissed against *Welles*, with costs.

M. R.
1865
Dec. 7.

VESTRY OF BERMONDSEY v. BROWN.

Easement—Way—Dedication—User—Vestry, right of to sue.

The dedication by the owner of the soil of a right of way from continuous user can only be presumed in favour of the public, not of the inhabitants of a particular parish.

The Vestry of a parish cannot sustain a suit to restrain the infringement of a public right of way, except as relators on an information by the Attorney-General, even though they are expressly authorized by Act of Parliament to indict any person stopping a right of way within the parish, "and to take such other proceedings for the opening thereof as to them should seem expedient."

The Vestry of a parish, so authorized by a local Act, filed a bill to remove an arch built over a way in the parish, which they alleged had been used by and dedicated to the public for forty years. It appeared that for the first twenty years of that period there had been a lease from the owner of the soil with a right to build over the way; that then the lease became merged in the inheritance; and that, since, the Vestry had claimed the way as belonging to them for the exclusive use of the inhabitants of the parish:—

Held, that the suit could not be sustained on its merits and was not properly framed.

THE Plaintiffs in this suit were the Vestry of the parish of *Bermondsey*, the Defendant was the owner of a wharf at *Bermondsey Wall*, bounded on the north by the river *Thames*, on the west by a dock, and on the east by a way ten feet in length, leading from *Bermondsey Wall* to the *Thames*. The object of the suit was to compel the Defendant to remove a certain arch and building which had been erected on the said way, called the *Ten-foot Way*, which the Plaintiffs alleged was a public way, and had for nearly forty years been continuously used as of right by the public as an open and uncovered way, without any interruption, and without any agreement with the Defendant or his predecessors in title or any other owner of the way or the adjacent premises.

By the 57 Geo. 3. c. 29 (an Act for better paving the streets of the metropolis), certain powers were given to the commissioners having the control of the pavements of any parish within the operation of the Act, and it was provided that the powers thereby conferred on them might be exercised by all persons having, under any local Act, the control of the pavements in the streets in any

district within the jurisdiction of that Act, whether in such local Act they were designated as vestrymen, commissioners, or otherwise; and by s. 72 they were empowered to remove obstructions.

By the 8 & 9 Vict. c. 177 (a local Act for the improvement of the parish of *St. Mary, Bermondsey*), s. 165, after reciting that there were several ancient landing-places on the banks of the *Thames*, and other rights of way within the parish, and that it was expedient that the same should be kept open for the use of the inhabitants of the said parish, it was enacted that it should be lawful for the commissioners thereby appointed, in all cases where the person stopping up any such landing-places or rights of way would be liable to an indictment, to indict any person who should stop or impede any such landing-places or rights of way, "*and to take such other proceedings for the opening thereof as should appear to the commissioners expedient.*"

By the 18 & 19 Vict. c. 120 (an Act for the better local management of the metropolis), it was enacted by s. 96, that every vestry and district board should, within their parish or district, execute the office of surveyor of highways. And that all streets being highways should be under the management and control of the Vestry or district board of the parish or district in which such highways were situate. And by s. 119, that if any obstruction placed in front of any building should be an annoyance by rendering less commodious the passage along any street in their parish or district, it should be lawful for the vestry or district board to give notice to the owner or occupier of such house to remove the same as therein directed. This Act was amended by 19 & 20 Vict. c. 112, giving further powers to the Vestry.

By the 25 & 26 Vict. c. 102 (an Act to amend the metropolis local management Acts), it was enacted by s. 73, that the powers of improving and regulating streets contained in the Act of 57 Geo. 3, c. 29, so far as the same was in force and was not inconsistent with the 18 & 19 Vict. c. 120, should extend and apply to the metropolis as defined by that Act; and by other sections of the said Act powers were given to the Vestry or district board to maintain the streets and highways within their parish or district for the public benefit.

The bill alleged that the said *Ten-foot Way* had for upwards of

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forty years been maintained and repaired as a public highway at the expense of the parish of *Bermondsey;* that it was a valuable right, and much frequented and used by the inhabitants of the parish and the public; and that, under the provisions of the said Acts, it became vested in the Vestry of *Bermondsey*, and was now vested in the Plaintiffs as such Vestry. The Plaintiffs insisted that the arch erected by the Defendant darkened the said way and prevented the free use of it as heretofore, and prayed that the Defendant might be restrained by injunction from permitting the said arch and building to remain across the said *Ten-foot Way*, or so that the said way or the right of user and enjoyment of the same by the public as an open and uncovered way might be hindered, obstructed, or interfered with.

The Defendant denied that the public had any right, as against him, to the use of the said *Ten-foot Way*. His case, as stated in his answer, was in substance as follows:—

In the year 1774, the site of the said *Ten-foot Way* was the property of *Sarah West*, the elder, who was the owner of nearly the whole of the parish of *Bermondsey*. In 1795, large portions of the said property were subject to the power of appointment of *Sarah West*, the younger, and by her devised upon certain trusts. Under her will, *James Robert West* became tenant for life in possession before 1818, and died in 1838, leaving an eldest son of the same name, who had, in 1835, barred the entail, and resettled the estate upon himself for life, with remainder to his first and other sons in tail.

By an Act of 41 Geo. 3, the site of the *Ten-foot Way* (which, as the Defendant contended, was then covered with buildings that were pulled down before 1818) became vested in the devisees in trust under *Sarah West's* will.

By a lease dated the 28th of October, 1818, the said *James Robert West* demised to *T. K. Creak* certain warehouses and buildings near *Bermondsey Wall*, and near the wharf and way, and granted to the lessee and his assigns the liberty and use, during the term, in common with others the tenants of the said *J. R. West*, of the wharf and *Ten-foot Way* which had been recently formed.

By another lease of the 1st of May, 1821, the said *J. R. West*

demised to *W. Rattenbury* for 51 years the piece of ground north of *Bermondsey Wall*, exclusive of a passage or way of ten feet wide (meaning the said *Ten-foot Way*), and the said lease contained a covenant by the lessee to erect a warehouse or building, so that, if carried over the said way, it should be at least nine feet above the level of the street, and should leave the way ten feet wide.

In 1822, the said *J. R. West*, and the trustees of *Sarah West's* will, sold the freehold of the premises demised to *T. K. Creak* to *L. W. Dillwyn*. In 1821 they conveyed to *T. E. Heron* the premises comprised in the lease to *W. Rattenbury*, subject to his term, and *T. E. Heron* afterwards conveyed them to *John Morris*, by whom they were mortgaged.

In 1839, the lease to *W. Rattenbury* became vested in *John Morris*, who, in 1845, sold the premises so leased to *W. Rattenbury*, and so conveyed to *T. E. Heron*, and conveyed the same to *T. C. Gibson*. In 1863 the entire interest therein was conveyed to the Defendant.

The Defendant contended that the soil of the *Ten-foot Way* passed under the lease of the 1st of May, 1821, and, if so, that the inheritance of the soil and of the land adjacent to it was vested in the Defendant: if not, that the inheritance of the soil of the *Ten-foot Way* remained in the devisees in trust of *Sarah West*; and that, in either view, if there had been a public user (which was denied), such user could form no foundation for a claim of public right as against the inheritance; and, further, that if the soil did not pass, no user by the public could give to the public, or to any one using the way, any claim to deprive the Defendant of the right to occupy it with buildings.

The witnesses on the part of the Plaintiff shewed uninterrupted user, by various persons, of the *Ten-foot Way* from the year 1818. Most of the witnesses spoke of the use of it "by the public generally." There was further evidence that since the year 1845 it had been repaired by, and at the expense of, the parish, and that the Vestry had claimed the way as being their property, and placed locks and keys there, and placed a notice board by the side of the way marked thus:—"Free landing-place belonging to the parish of *Bermondsey*." This was signed by the Vestry clerk. The Defendant contended that the general user of the *Ten-foot Way*, deposed to by the Plaintiffs' witnesses, resulted from the right

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given to the tenants of Mrs. *West's* estate, who were a large part of the parishioners of *Bermondsey*, and that the right claimed by the Vestry was inconsistent with the presumption, even if such could otherwise be inferred, of a dedication to the public.

Mr. *Hobhouse*, Q.C., and Mr. *Surrage*, for the Plaintiffs:—

The evidence clearly shows a continuous user of the way by the public for about forty years as an open highway, and a place for lading and unlading goods. From such user a dedication must be presumed as in *Rugby Charity* v. *Merryweather* (1), where uninterrupted user for eight years was held to be sufficient. The ruling of Lord *Kenyon*, in that case, had been questioned by Lord *Mansfield* in *Woodyer* v. *Hadden* (2); but this was a far stronger case, for there negotiations had been going on, during which the public had been negligently allowed to use the way. The rule is thus laid down by Lord *Ellenborough*, in *Rex* v. *Lloyd* (3): "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, although the passage was only intended for private convenience, the public are not now to be excluded after being allowed to use it so long without any interruption." In that case, as in the present, all the houses surrounding the way had belonged to the same person; there, there was the evidence of the way being lighted at the public expense; here, the way has been repaired by the parish, and, as was laid down by *Littledale, J.*, in *Rex* v. *Inhabitants of Leake* (4):—"If a road has been used by people in the parish, it furnishes evidence *pro tanto* of its being a way for the rest of the public; and if the parish have repaired it, it furnishes a strong evidence that it is a highway." As to the person in whom the fee is vested, the Court will not go into nice questions to ascertain to whom the fee belongs. Thus in *Reg.* v. *Inhabitants of East Mark* (5), Lord *Denman* observed (6):—"If a road has been used by the public from forty to fifty years, without objection, am I not to use it unless I know who has been the owner of it?" So

(1) 11 East, 375, n.
(2) 5 Taunt. 125, 142.
(3) 1 Camp. 260, 262.
(4) 5 B. & Ad. 469, 484.
(5) 11 Q. B. 877.
(6) 11 Q. B. 882.

in *Reg.* v. *Petrie* (1), where a dedication was presumed from user of eight years.

The Defendant contends that, owing to an arrangement made by the *West* family, numerous persons have a right to use this way; but he has adduced no evidence to shew that any one has such right to use it except *Creak*, to whom it was granted by his lease in 1818; whereas the Plaintiffs have evidence of uninterrupted user, without any adverse claim by the tenants of the *West* estate. There is no proof that it was intended for their use only, and if it were, it would be insufficient: *Reg.* v. *Broke* (2). The Defendant contends that, though continuous user may be good evidence of dedication as against the lessee, it would not be so against the reversioner; but we find that in 1839 the lease and the reversion became vested in the same person, *John Morris*, subject to his mortgage, and in 1845 the lease, the reversion, and the mortgaged interest all became vested in *T. C. Gibson*.

[The MASTER OF THE ROLLS:—If you establish that this is a public highway, ought not I to have the Attorney-General here?]

The object of the Attorney-General appearing is to protect the public; but as soon as the public is protected by properly constituted bodies, they are the proper parties to sue. The right to the soil being in the Vestry, they are the custodians of the rights of the public, and by the 8 & 9 Vict. c. 177, taken with the subsequent Acts, they are expressly empowered "to take such proceedings" for the opening of any landing-places or rights of way as should appear expedient. If the sanction of the Attorney-General were necessary, it would be expressly stated, as in the *Sewage Utilization Act* (3).

Mr. *Selwyn*, Q.C., Mr. *Mellish*, Q.C., and Mr. *Wickens*, for the Defendant:—

Dedication of a way to the public depends on intention: admitting that the Courts have gone a long way in presuming it when not rebutted, yet here the owner, when he granted the lease, never intended to give up the ownership of the property. There was a

(1) 4 El. & B. 737. (2) 1 F. & F. 514.
(3) 28 & 29 Vict. c. 75, s. 10.

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covenant contained in the lease to *Rattenbury* of the 1st of May, 1821, that the ground should be built over, leaving the *Tenfoot Way*, and the arrangement was, that other lessees of the *West* estate should have the right of user. These persons were very numerous, as the estate covered a large part of *Bermondsey*. In *Wood* v. *Veal* (1), it was held that there could be no dedication of a way to the public except by the owner of the fee. In *Jarvis* v. *Dean* (2), there was evidence of the owner's consent. Here there was no owner capable of exercising such an intention. The Plaintiffs' counsel relied on the repairs of the way being made by the parish, but the parish authorities, in this case, were nearly the same persons as those to whom the right was reserved by lease; besides, what was done was done by the parish, not on behalf of the public. They carefully excluded the public by their notices, and described the way as "belonging to the parish." There can be no dedication to a limited portion of the public, such as a parish: *Poole* v. *Huskinson* (3): and if attempted to be made it would be a mere license. The case of *The Rugby Charity* v. *Merryweather* (4), relied on by the Plaintiffs, was a *nisi prius* case, and is cited in a note to *Daniel* v. *North* (5), which is an authority the other way.

In the present case, by the lease to *Creak*, in October, 1818, the right to use the way was granted to him in common with others; a dedication to the public, therefore, would have been a derogation from his right. The intention clearly was that it should be for the use of the tenants of the property. Then there was the lease to *Rattenbury* in 1821, with the right of building over the way. There may be a dedication subject to such a right as that, and then the public must take it as they can, as in *Fisher* v. *Prowse* (6), but the owner cannot thereby derogate from the right. In 1845, the lease became merged in the inheritance, and then, according to the evidence, bars were put up, and locks, the keys being kept "for the use of the inhabitants" of the parish. In this state of things no dedication can be inferred. Even if there be such a thing as a right of way vested in a parish (which the law does not recognize),

(1) 5 B. & Ald. 454.
(2) 3 Bing. 447.
(3) 11 M. & W. 827.
(4) 11 East, 375, n.
(5) 11 East, 375.
(6) 2 B. & S. 770.

the Vestry would have no right to assert it, and no *locus standi* to sue in order to protect the rights of the parishioners. If there were a dedication to the public, then the Vestry had no right to sue without the sanction of the Attorney-General. No such right was vested in them by the Act of 8 & 9 Vict. c. 177, for the object of that statute was to enable the commissioners, now represented by the Vestry, to sustain an indictment.

Mr. *Hobhouse*, in reply:—

The dedication of this way was no derogation of the grant to *Creak*, it was an extension of the grant; nor was it any derogation of the lease to *Rattenbury*. The evidence establishes such a user as to be good against the beneficial owner from the year 1826. The case of *Wood* v. *Veal* (1) does not apply, because there there was no evidence against the reversioner. Then, as to the condition in the lease to *Rattenbury*, the covenant did not oblige the lessee to build over this way; it only entitled him to do so; and if there was any obligation, it ceased when the lease and reversion were united, for there could be no obligation from a man to himself. The Defendant contended that there could be no right of way vested in the parish, and that a dedication to the parish would be void; but we rely on the 8 & 9 Vict. c. 177, which, as the evidence shews, included this *Ten-foot Way*, the right to which was vested in the Vestry for the benefit of the inhabitants. As to the right of the Vestry to sue, that may be inferred from the 57 Geo. 3, c. 29, s. 72, for, if they have a right to remove obstructions, they have also a right to sue for their removal. If, as is contended, the right of way is vested in the Vestry for the benefit of the inhabitants, a representative suit to protect that right is unnecessary. Whether the user operated for the benefit of the public or for the benefit of the parish, in either case the Vestry is entitled to sue.

SIR J. ROMILLY, M.R.:—

This suit is instituted to compel the Defendant to remove an arch and building which he has erected over a certain passage which runs from the street called *Bermondsey Wall* to the river

(1) 5 B. & Ald. 454.

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Thames, and which is called the *Ten-foot Way*. The Plaintiffs insist that this is a public way, whereas the Defendant insists that it is a way belonging to an estate in *Bermondsey* formerly called by the name of *Mrs. West's Estate*.

One difficulty in the way of the Plaintiffs in this case, which struck me very early in the course of Mr. *Hobhouse's* argument, is this, that if this way is claimed as a public way, the suit ought to have been instituted, by way of information, by Her Majesty's Attorney-General. This difficulty had been previously felt by Mr. *Hobhouse*, who endeavoured to overcome it by referring to the various local and public Acts which related to this matter, and especially to the 165th section of the 8 & 9 Vict. c. 177, which is the local Act for improving the parish of *Bermondsey*, and which enables the commissioners thereby appointed to make and enforce rules for the use and maintenance of landing-places, and for indicting persons who stop up or impede the same; which, Mr. *Hobhouse* contended, when united with the statutes for the better local management of the metropolis, made the Vestry of *Bermondsey* the custodians to guard that way, and enabled them to sue or prosecute any person who should impede or stop up any of such rights of way.

I thought at the time, and further examination of the Acts of Parliament tends to confirm that view, that it was not intended by those Acts, or by any clauses to be found in them, to delegate to the commissioners named in the first Act, or to the Vestry, who have now delegated to them the powers conferred on the commissioners, any powers or authorities previously vested in the Attorney-General, and that, accordingly, if the Vestry indict any one under that Act, they must proceed in the name of the Queen before a grand jury, who must find a bill before it can be tried; and if they apply to the Court of Chancery, it must be with the name of the Attorney-General as Plaintiff in an information.

As I was desirous of not determining the question on any ground which might lead to another suit being instituted, I thought fit to consider the cause as if it had been brought before me in the shape of an information of Her Majesty's Attorney-General at the relation of the Vestry of the parish of *Bermondsey*, which I have accordingly done.

After reading and examining all the evidence, I find that almost the whole of the evidence on both sides, both that for the Plaintiffs as well as that for the Defendant, negatives the position that this *Ten-foot Way* was ever dedicated to the public, and that what little evidence there is, which is in favour of the general user of it by the public, is consistent with the opposing evidence, or is explained and overpowered by the evidence filed on behalf of the Defendant. This will appear by a short recapitulation of the history of the *Ten-foot Way*, and the evidence relating to it.

Up to the year 1814, this way had no existence. The place where it now is was covered with buildings. It seems, as far as I can judge, to have been created in 1818 by the *Wests*, for the benefit of their tenants. It is first mentioned in a lease for eighty years, to a person of the name of *Creak*, in October, 1818, when a right to use the way is included in a demise granted by the owners of *West's* estate in *Bermondsey*. This lease is still subsisting, and will continue, unless it happens to be merged, until the year 1898. The next lease is for fifty-one years, and was granted in 1821, under a power, by Mr. *West*, the tenant for life of the estate, to Mr. *William Rattenbury*, and contains a power to the lessee to build over this way, provided the breadth of it be allowed to remain ten feet, and the height of it nine feet. These leases negative any dedication to the public at that time.

The general user of this *Ten-foot Way* by various persons is proved, I think, since the year 1818, down to the present time (and this is what the Plaintiffs principally rely upon), subject, however, to the observations which I am about to make; but whether it has been used by any persons other than the tenants of the *West* estate, or if so by any persons other than the inhabitants of the parish of *Bermondsey*, is nowhere made clear; and as long, therefore, as the lease of 1821, which gave authority to build over it, remained in existence, no dedication from user could be presumed against the owner of the property. In July, 1845, however, this lease was merged in the inheritance, and since then, it is contended by the Plaintiffs, there has been that constant user of it by the public, from whence this dedication may be presumed; but the evidence given on behalf of the Plaintiffs themselves repudiates all inference of that character, for in the same year, namely, 1845, when the lease to *Rattenbury*

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was merged in the inheritance, the Plaintiffs, the Vestry, claimed this way as being the property of the parish, as opposed to, and distinct from, any dedication to the public. Accordingly, in that year they put up a board, by the side of the way, with this inscription upon it: "Free landing-place belonging to the parish of *Bermondsey*. *George Henry Drew*, Clerk to the Vestry." This, then (for it is a claim of the way as property belonging to the parish), is a repudiation of the right of the public to use it. This board is continued up to the time of filing this bill, and up to that time the Vestry claimed the individual property as distinct from the general right of the public to use it. If this evidence were ambiguous, the ambiguity is removed by the records of the Plaintiffs themselves; for so solicitous was the Vestry that the *Ten-foot Way* should be the property of the parish, and open to the parishioners of *Bermondsey* only, to the exclusion of the rest of the public, that in the same year the surveyor of the parish, under the authority of the Vestry given on the 14th of October, 1845, repaired the posts and rails before the *Ten-foot Way*, and provided locks and keys to be placed there, under the care of some housekeeper residing near the way, in order to secure that the use of the way should be confined to the inhabitants of the parish of *Bermondsey*. This order was repeated in the month of December then next following.

Mr. *Riche's* affidavit on this point is conclusive against any right of the public to use this way, and confines the use of it to the inhabitants of the parish. He says that there is evidence that from the year 1818 the way was open, and that until 1845 it was generally used by the public. It was used by any one who pleased to use it, because no one inquired whether the person was a tenant of the *West* estate or a stranger; but during all that time, up to 1845, the cases negative any dedication of it to the public, and since the year 1845 the evidence of the Plaintiffs negatives it.

The evidence of the Defendant establishes, that up to 1845 it was a private road belonging to the owner of the *West* estate, and since that time, upon the evidence of the Plaintiffs, it is established that the public had no right to it, but that the use of it was claimed by the Vestry of *Bermondsey* as a private right belonging

to the parish, to be used by parishioners alone, and that it was never relinquished by the original owners of the soil. Indeed, it seems to me that the same feeling is now prevalent in the Vestry, and that this explains why they alone are made the Plaintiffs in this suit, and not the Attorney-General on behalf of the public.

I do not doubt that a parish might possess, as private property, such a right of way as this *Ten-foot Way*, in the same manner as they might possess a field, but it must be by a grant from the owner of it; neither do I doubt that, if such a use was conferred upon the parishioners, a dedication to the public would not be presumed without cogent evidence. A dedication to the parish by the owner of the soil cannot be presumed: a dedication from user can only be presumed in favour of the public generally, and not in favour of the inhabitants of a particular parish. This is laid down in *Poole* v. *Huskinson* (1), and is unquestionable law. That case also establishes this proposition, that not only cannot any such dedication be presumed, but that, if actually made, it is simply void. That case is important in other respects also; it shews that to constitute such a dedication to the public by the owner of the soil, there must be an intention to dedicate on his part.

In this case the intention of the owner to dedicate is negatived up to 1845 by the existence of *Rattenbury's* lease. It is negatived also by the contents of *Creak's* lease, which is still subsisting. The right claimed is further rebutted by the fact, that since the year 1845 the public have not used the *Ten-foot Way*, inasmuch as the Plaintiffs themselves have prevented the public, not being inhabitants of the parish of *Bermondsey*, from so using it, and have set up a claim to it, both in their books and also in their acts, as being the private property of the parish.

The Defendant has built over it, but in so doing he has observed the limits provided by the lease to *Rattenbury*, and so doing he was entitled to build upon it; and this suit on the part of the Plaintiffs wholly fails on the merits, besides being defective in the frame of it. The bill must therefore be dismissed with costs.

(1) 11 M. & W. 827.

In re MARLBOROUGH CLUB COMPANY.

V.-C. K.
1865
Dec. 15.

Companies Act, 1862—*Winding up—Petition, advertisement of—Notice—Appearance—Costs.*

The advertisement of a winding-up Petition, under the orders of 1862, is of itself sufficient notice of such Petition to justify the company and shareholders who are interested in such company in appearing on the Petition, and if they are successful in opposing it, they are entitled to their costs, although they may not have been served with the Petition.

And in a case where a company and shareholders, though not served, appeared on a Petition, after notice that it was intended to be withdrawn, they were held entitled to costs incurred by them before they had notice of such intended withdrawal.

THE only question which arose on this Petition was, whether certain parties who had appeared on it should be allowed their costs under the following circumstances:—

A Petition was presented for winding up the above company, on the ground of insolvency, on the 21st of November, 1862, and was duly advertised on the 28th of November, in accordance with the Orders of November, 1862. The Petition was never served on the company or any person. A board meeting of the directors of the company was held on the 5th of December, the Petition having been advertised to be heard on the 8th of December. At that meeting a discussion took place which resulted in the Petitioner's solicitor giving the company a written notice of the withdrawal of the Petition. The chairman of the meeting mentioned to Mr. *Edmunds*, the Petitioner's solicitor, who was present, the fact that some costs had been occasioned to the company by the Petition, and asked whether the Petitioner would pay them; but this was refused; and the chairman then stated that the company would take steps to recover their costs.

The company and some of the shareholders having notice through the advertisement of the Petition, applied for and received a copy of the Petition; but others who had the same notice did not obtain a copy.

The Petitioner having resolved to withdraw the Petition, informed the parties who had taken copies of the Petition, by letter, of the intended withdrawal; but the withdrawal of the Petition was never advertised.

On the Petition coming on for hearing on the 8th of December, the company and various shareholders, some of whom were directors, and others creditors of the company, appeared by counsel and applied for their costs.

With regard to the shareholders who had received notice by letter of the intended withdrawal of the Petition, it appeared that some received it on the 6th, others on the 7th, and others on the 8th, the day on which it came into the paper for hearing. It will be sufficient to state, that the conclusions at which the Court arrived on the evidence were, that the company and some of the shareholders had incurred costs before they knew of the intended withdrawal of the Petition; but that as to others there was no such evidence.

Mr. *Caldecott* asked that the Petition might be allowed to be withdrawn. With regard to the company and the shareholders who had appeared, none of them had been served; and therefore, if they appeared, they did so voluntarily, and at their own risk, and were not entitled to costs. But even suppose that were otherwise, the company and the shareholders, before the Petition came on for hearing, had notice of its withdrawal; and that being so, they were not entitled to come to the Court for the mere purpose of creating and asking for costs.

Mr. *Stevens* (for Mr. *Cracknall*) and Mr. *Willis*, for the company, and Mr. *Pontifex* and Mr. *Laurie*, for the different shareholders, asked for their costs. When they became aware of the Petition through the advertisement, both the company and the shareholders were obliged to take steps for the protection of their interests, and costs in doing so had been incurred before the notice of intended withdrawal had been received; had the Petitioner tendered costs, that would have been different; but that not having been done, it was necessary for the Respondents to come to the Court to get the costs so incurred by them.

The fact that the Petition had not been served did not affect the

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MARLBOROUGH CLUB COMPANY.

question of costs. The company and the shareholders had sufficient notice through the advertisement to justify them in taking steps for opposing the Petition. In *Shaw* v. *Forrest* (1), parties not formally served with a notice of motion, yet substantially made Respondents, were held entitled to their costs.

Mr. *Caldecott*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

1 Ch. D. 618.

With regard to the company, I have no doubt but that they are entitled to their costs. It is contended that the company has not been served, and therefore is not entitled to appear on the Petition. But there is no foundation for that argument. When the directors became aware, through the advertisement, that the Petition for winding up had been presented, it was necessary for them to take steps to oppose it; and every person interested who had such notice was entitled to come forward and oppose the Petition for winding up, for which Petition, it appears to me, there were no good grounds. The company, therefore, must have their costs.

With regard to the shareholders, it was not necessary that they should be served, the advertisement being of itself a substitute for actual service; the object of the advertisement being that all shareholders may have notice of such a Petition, so as to enable them, if they think fit, to come forward and oppose the application.

The question is, whether any of the costs were incurred before notice of the intended withdrawal of the Petition was received, where it was received at all. I am of opinion that any costs incurred before notice of the intended withdrawal was received by the shareholders must be paid to them by the Petitioner, together with their costs of appearance, but that they are not entitled to any costs incurred after they had received notice of the intended withdrawal of the Petition.

(1) 20 Beav. 249.

In re EAST OF ENGLAND BANK.

V.-C. K.
1865
Nov. 16, 18.

FELTOM'S EXECUTORS' CASE.

Winding-up—Companies Act, 1862, s. 165—*Executors.*

The 165th section of the *Companies Act*, 1862, which confers power on the Court to compel payment by directors and officers of companies in respect of misfeasance or breach of trust relating to the affairs of the company, does not apply as against the executors of a deceased director.

Where acts of directors or other officers sought to be inquired into are the acts of a body of persons, some of whom are dead—*quære*, whether the Court can proceed against the survivors under the 165th section, or whether a suit is not necessary.

THIS was an adjourned summons taken out by the executors of *Clement Mingay Feltom* (deceased), who had been a director of the *East of England Bank*, for the purpose of staying proceedings under a summons taken out on the 18th of February, 1865, and which had been served upon them as such executors.

The liquidators appointed under the voluntary winding up of the company under the supervision of the Court, having determined to take proceedings against the directors of the bank in question under the 165th section of the *Companies Act*, 1862, (1) served upon the directors still living, and upon the executors of such of them as were dead, a summons, calling on them to attend at the Judge's Chambers on the 18th of February, 1865, on the hearing of an application on the part of the liquidators of the company, that the Court might examine into the conduct of the directors of the company [naming them] (*Clement Mingay Feltom* being one of the directors named) as such directors, and especially with reference to certain charges of misfeasance referred to in the summons, and of the losses occasioned thereby; and that the amounts for which the said directors had become liable to contribute to the assets of the company in respect of any misfeasance committed by them as such directors might be ascertained, and ordered to be paid to the said liquidators.

This summons was served on the executors of *Feltom* and of other deceased directors, as well as on the surviving directors.

Upon the application of the executors of another director to whom

(1) 25 & 26 Vict. c. 89.

V.-C. K. 1865 FELTOM'S EXECUTORS CASE.

the summons had been addressed, the liquidator had been ordered to furnish a statement of particulars of charges, which was furnished in May, 1865.

From this statement it appeared that the charges against the directors were, that they had neglected to wind up the company, and had continued to carry on business after the surplus capital and one quarter of the paid-up capital of the bank had been exhausted by reason of losses, contrary to the provisions of the deed of settlement of the bank; that they had made reckless and improper investments of the funds of the bank in various specified particulars; that the chairman of the board of directors and the manager of the bank had been allowed to change their joint and several liability for moneys owing by them to the bank into a several liability of each for one-half the debt, and that the board had released them, or one of them, from payment of interest on such debt; that the directors had made false and fraudulent entries in the books of the bank, and had issued false reports, by which it was made to appear that dividends paid by the bank were paid out of profits, whereas there had been no profits, but heavy losses; and that the dividends were paid out of the capital funds of the bank. As to each of these particulars it was alleged that the bank had thereby sustained heavy losses.

It appeared that *Feltom* never was personally on the list of contributories, he having died in 1863, and the bank not having stopped payment till 1864.

It was admitted that there was no authority upon the point now raised.

Mr. *Baily*, Q.C., and Mr. *Phear*, in support of the summons:—

The 165th section of the Act of 1862 only gives jurisdiction to the Court to inquire into the conduct of a living person, and does not apply to the persons representing his estate after his death. It contemplates the case of a living person only, and that person himself being brought before the Court to answer for his default, and then being compelled to pay what the Court thinks just. The language of the section is to compel *him* to pay, and shews that it cannot apply to the executors of a deceased officer of the company, as the Court cannot *compel* executors to pay; moreover, some of

the matters which the Court under this section has to examine into are matters of *tort*, which would not survive after the death of the individual himself as against his estate.

In the other sections of the Act intended by the Legislature to apply to the case of representatives, they are expressly specified, as in sections 77, 99, 101, 105, 119; but there is nothing of the kind in section 165.

The Master of the Rolls and the Lords Justices have held that the discretion in the Court under the 165th section should be exercised only in simple cases: *Bank of Gibraltar and Malta* (1).

The section applies to all officers of the company; and it is a great hardship for executors to be called on to answer on this summary proceeding for the acts of the persons whose estates they represent, regarding which they may, and in most cases probably would, know nothing.

Mr. *Wickens*, and Mr. *Cozens Hardy*, for the official liquidator:—

The construction contended for on the other side is very narrow. There is nothing in the 165th section to shew that the bringing a defaulting individual personally before the Court was alone contemplated. The director *Feltom* was a trustee, and liable as such for all breaches of trust sounding in equitable damages, and he being dead, his estate is liable for them. The acts complained of are not *torts*, but matters over which this Court has jurisdiction. The 165th section is not a penal section; it provides equitable remedies as between partners, and must be construed in connection with the 101st section, which provides for the payment of legal and equitable liabilities. The argument that, because in the 167th and 168th, or any other sections, the remedies against the estate of a deceased shareholder are specially provided for, therefore the 165th section does not apply as against the executors, is not well founded; looking at the whole scope of the Act, the inference would be the other way.

On the ground of convenience, the Court will strive to entertain jurisdiction against executors under this section. As in the present case, the acts complained of are generally not the acts of an individual, but of a body of persons; and where, as often

(1) 34 L. J. (N. S.) Ch. 617: On appeal, Law Rep. 1 Ch. 69.

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happens, some of them are dead, the persons living can be made liable jointly with the estates of those who have died much more conveniently under the Winding-up Acts than in a suit.

The suggestion of a case of hardship against the executors is groundless; all the information on which the charges are founded being contained in the books and papers of the company, which are in Court, accessible to all parties; and the executors would have the right to cross-examine the official liquidator if he makes an affidavit.

Mr. *Baily*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

The question in this case is quite new. It depends upon the construction of the 165th section of the *Companies Act*, 1862, having regard to the provisions of the 101st, 105th, and 109th sections.

Some of the charges made against the directors are of a somewhat peculiar nature, and such as, I think, it would be impossible to hold that the Court could take into consideration in acting under the general powers given to the Court by the 109th section, to adjust the rights of the contributories *inter se;* though others of these charges might, perhaps, come within the scope of that section.

The 101st section is placed by the framers of the Act under the heading "Ordinary Powers of the Court," and so also is the 109th section. It is to be observed, with respect to the 101st section, that it applies exclusively to contributories, but includes those persons who are on the list of contributories as representing the estate of a deceased shareholder; and, further, that it applies (as I conceive) only to cases in which there is an actual debt, in the proper sense of the term, due from the shareholder to the company; and it does not include cases in which persons may be subject to be made liable for mismanagement or misconduct. It may be difficult, sometimes, to draw the precise line of distinction between the two; but I think that it clearly would not apply to the case (for example) where directors were sought to be made liable for not winding up the company in due time, or for making imprudent investments. And it is further to be observed, with

respect to the 101st section, that the language which it uses with respect to the mode of procuring payment of the debts to which it refers is, "The Court may make an order directing payment to be made," and not as in the 165th section, "Compel him to pay;" a difference which I consider material, and which I shall presently notice more particularly.

The 165th section comes under a different heading—that of "Supplemental Provisions." One might have expected to find it under the heading, "Extraordinary Powers of Court;" but for some reason it is placed under a heading which seems to indicate that it is to be regarded as a provision supplemental both to the ordinary and to the extraordinary powers conferred on the Court.

This 165th section applies to any person, whether a contributory or not, who being, or having formerly been, a director, manager, or officer of the company, or even an official or other liquidator, is charged with having misapplied or retained, or become liable or accountable for, any moneys of the company, "or being guilty of any misfeasance or breach of trust in relation to the company." These words, I think, would embrace all the charges made against *Feltom*.

According to the language of the 101st section, as I before observed, the Court is authorized to "make an order directing payment to be made" of any debt due from any person who is on the list of contributories, or from the estate of any deceased person whose legal personal representatives are on the list of contributories; whereas, according to the language of this 165th section, the Court is authorized to "compel payment" of any moneys which, upon investigation, shall be found to be payable by any person to whom this section is intended to apply. Now, what is the reason for this difference of language in the two sections? Why did not the Legislature in the 101st section use the language, "Compel him to pay," which is used in the 165th section? I apprehend that it is clearly for this reason: With regard to executors or administrators, who are on the list of contributories as representing the estate of a deceased shareholder, the Court, under the winding up, cannot *compel them to pay* anything which is payable by the estate of the deceased. It cannot, in the winding up, administer the estate of the deceased; all that it can do is to make an order directing payment to be

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made out of the deceased's estate, and so in effect declaring the official liquidator to be a creditor of the deceased; and then, under the 105th section, proceedings may be taken for the purpose of getting the estate of the deceased administered in the ordinary course by suit. And it is to be observed that, for the same reason, in the 102nd section, which authorizes the making of calls, and which (like the 101st section) applies to those who are on the list of contributories as legal personal representatives, language is used similar to that used in the 101st section. "The Court may make calls on, and *order payment thereof*, by all or any of the contributories, &c." I have no doubt that in those two sections (the 101st and 102nd) the Legislature advisedly abstained from using the language, "Compel him to pay," because those sections embrace the cases of legal personal representatives of deceased persons, who could not be compelled to pay. And if this be so, when we find the 165th section authorizing the Court to examine into the conduct of a director, manager, or other officer of the company, and, if it finds him liable, to *compel him to pay*, I think that sound reasoning leads to the conclusion that that section was not intended to apply to the case of executors or administrators of a deceased person, for it is clear they cannot be compelled to pay in the winding-up proceedings. I do not decide this on the mere ground that the words are "Compel *him* to pay," without mentioning his executors or administrators, though that is not altogether without its significance, but because the language is inapplicable to the case of executors or administrators. It is said that this is a narrow construction to put on the statute. That is true in this sense, that it is a narrower construction than might have been given to the section if it had been couched in different language; but the Court has no right to stretch the powers intended to be conferred by the Legislature.

I am of opinion, therefore, that the 165th section cannot be made available as against *Feltom's* executors.

It has been observed on the part of the official liquidator that, as the charges are made not only against *Feltom*, but also against other persons with him, if proceedings cannot be taken as against his executors, they cannot be taken against any of the other persons, according to the view of Vice-Chancellor *Parker* in

Carpenter's Executors Case (1). It is, however, to be observed that that case turned upon a totally different clause in the *Winding-up Acts* of 1848, and *non constat* that the same principle would apply to the present case. But even if it be true that the conclusion suggested follows, and that the result is that there is no remedy except by suit, still, if the Legislature has given the Court authority, under the Winding-up Acts, to deal with a given class of cases in a certain specified way, the Court would not be justified in extending the jurisdiction to other cases not within the terms of the Act.

Upon the whole, it appears to me that the proceedings under the first summons should be stayed as against the executors of *Feltom*.

The costs of all parties out of the estate.

In re LEEDS BANKING COMPANY.

ADDINELL'S CASE.

Company—Winding up—Contributory—Contract to take Shares—Forfeiture.

The *Leeds Banking Company* having decided upon issuing their reserved shares, addressed a circular to the shareholders, offering them one new share for every five shares held by them, to be paid for on a day named, and requesting to know whether in the event of any shares remaining they would wish to have any additional shares. *Addinell* was offered four shares in respect of the twenty held by him, and in answer to the circular he agreed to take his proportion of allotment and asked for additional shares if he could have them. The reply stated that the directors had allotted him four extra shares in addition to the four shares already accepted by him. In this reply there was a further clause not contained in the first circular, that if the amount were not paid by the day named, the shares would be forfeited. Nothing further was done and no payment was made in respect of any of the shares:—

Held, that a contract was constituted in regard to the first four shares by the offer and the acceptance, but the contract was not complete as to the four extra shares by reason of the clause of forfeiture which was a new term added to the contract and not accepted by payment within the time specified.

THIS was an adjourned summons on the application of the official liquidator to settle Mr. *Addinell* on the list of contributories.

(1) 5 De G. & S. 402.

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The *Leeds Banking Company* was established in the year 1832, under the provisions of the 7th Geo. 4, c. 46, by a deed of settlement dated the 19th of November, 1832. The capital was to be one million, in 10,000 shares of £100 each, of which about 8000 were allotted, and the residue reserved until the summer of 1864, when they were allotted by the directors as hereinafter mentioned.

Between the opening of the Bank and the year 1840, the company, through their directors, purchased a number of shares originally allotted. These shares, in number 735, were entered in the books of the company, as being held by two directors, as trustees for the company. On the 19th of September, 1864, the bank suspended payment, and on the 13th of October, 1864, a winding-up order was obtained, and an official liquidator appointed.

The circumstances under which the present question arose were as follows:—

At a meeting of the directors of the company, held on the 26th of May, 1864, it was resolved to issue the reserved shares—one share to every holder of five shares and upwards; and at a meeting on the 16th of June, 1864, it was resolved that a circular should be sent to all the shareholders offering these shares at £30 each, being a premium of £15 per share.

In pursuance of these resolutions the following circular was addressed to the shareholders on the 22nd of June, 1864.

"SIR,—The directors of the *Leeds Banking Company* being of opinion that it is desirable to issue the reserved shares, have directed me to offer you one share for each five shares held by you, at the sum of £30 per share. As you hold shares, you are entitled to of the new shares. I shall be obliged if you will, within fourteen days from this date, sign and return me the annexed form, stating whether you are desirous of taking up the shares, and also whether, in the event of any shares remaining, you wish to have any more allotted to you. If so, please say how many. If taken up, the amount must be paid to the bank on or before the 1st of October next (if paid before that time interest at £5 per cent. will be allowed), and the shares will then be entitled to one quarter's dividend at the end of the year."

Appended to the above was the following form :—

" In reply to your circular of the 22nd instant, I agree to take shares, being my proportion of allotment, and shares in addition, if I can have them on the terms stated in your circular."

This circular was sent to Mr. *Addinell*, who was the holder of twenty original shares in the company; and he, on the 4th of July, replied in the appended form, agreeing to take four shares, being his proportion of allotment, and his proportion of shares, in addition, if he could have them on the terms stated in the circular.

It was then resolved at a board meeting of directors, held on the 14th of July, 1864, " that the remaining shares undisposed of should be allotted," and on the 18th of July the directors, by circular, informed Mr. *Addinell* that they had allotted to him four additional shares for which he had applied, at the sum of £30 per share, in addition to the four shares previously accepted by him, making his number of new shares eight; and the circular proceeded as follows :—

" The amount to be paid to the bank on or before the 1st of October next, or the shares will be forfeited (if paid before that time interest at £5 per cent. will be allowed), and the shares will be then entitled to one quarter's dividend at the end of the year."

No payment had ever been made by Mr. *Addinell* in respect of the shares when the bank failed, and nothing further was done by either party.

Mr. *Glasse*, Q.C., and Mr. *Cotton*, for the official liquidator :—

This case is nearly the same as *Barrett's Case*, decided first in this Court (1), and subsequently by the Lords Justices. The chief difference in this case is that there was no payment upon the shares by Mr. *Addinell*.

There are two points for decision: first, whether there was a contract completed between the company and Mr. *Addinell*, with respect to the first four allotted shares; and, secondly, whether there was a contract in regard to the four additional shares

(1) 2 Dr. & Sm. 415. 1 Jur. N.S. 234

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subsequently allotted. With regard to the first four there can be little doubt that the contract was complete. The circular of June 22 contained a definite offer of four shares. The reply of Mr. *Addinell*, on the 4th of July, contained an unqualified acceptance of that offer. The offer and the acceptance constituted a complete contract; and it was not necessary that there should be any payment of money to make the contract more complete. Mr. *Addinell* was informed that the amount must be paid on or before the 1st of October; and if paid before that day, interest at £5 per cent. would be allowed. There was nothing in this stipulation that rendered the contract incomplete in case payment was not made by that day.

Then with regard to the additional shares. By the circular of June 22, there was an offer of more shares, and Mr. *Addinell*, in his answer, accepted the offer of "his proportion" of shares. The contract was then complete as to these additional shares, and the letter of July 18 only announced to Mr. *Addinell* what the number or proportion of his additional allotment was. It was true there was a clause in the letter of July 18, providing, that if the money were not paid the shares would be forfeited; but this did not alter the condition the parties were in, from the time of the allotment. It was merely a statement by the directors of what their rights would be in case they chose to enforce them upon non-payment of the money.

Mr. *Baily*, Q.C., and Mr. *Wickens*, for Mr. *Addinell*:—

The company offered certain new shares to Mr. *Addinell*, and he by his letter of the 4th of July accepted this offer, and by the letter of the 18th of July he was informed what number of new shares had been allotted to him. If the matter had ended there there would, according to the decision in *Barrett's Case*, have been a complete contract; but the last circular went on to stipulate thus: "the amount to be paid on or before the 1st of October next, or the shares will be forfeited." That was a new term or condition, introduced into the contract to which Mr. *Addinell* never assented, therefore no contract was completed.

There was the same clause of forfeiture in *Barrett's Case*, but he was held to have accepted the contract by payment of the money.

It was at the option of the allottee of shares to take advantage of the stipulation by non-payment. The attempt to put a new term into the contract relieved Mr. *Addinell* from liability, unless he accepted it. It was as much as to say, "If you do not pay, then the allotment will be void." *In re Direct Birmingham Railway Company; Ex parte Capper* (1); *Oriental Steam Company* v. *Briggs* (2).

Then this point applies to all the eight shares. It cannot be said that there was one term applicable to the first four shares and another term to the additional shares. The threat of forfeiture applied equally to all the shares, that is, to the two sets of shares. If the transaction had stood without the last circular of the 18th of July, then the company might have enforced a contract as to the first four shares, but the introduction of the clause of forfeiture added a new term to the whole contract, which was therefore not complete unless accepted by payment of the money before the 1st of October.

Mr. *Glasse*, in reply.

Sir R. T. Kindersley, V.C., after stating the facts as already set forth, continued:—

In the former case of *Ex parte Barrett*, the question was whether th econtract was a contract to take shares *in presenti, i.e.*, at the time of the contract, or whether it was a contract to take them at a future time, which time did not arrive till after the bank had ceased to carry on business; and it was decided by myself in the first instance, and afterwards by the Lords Justices, that it was a contract to take shares *in presenti*. That applies, of course, to this case of *Addinell*, if he actually entered into a contract.

Now what is the effect of the circular of the 22nd of June from the secretary, which was the first step to what is alleged to be a contract? It appears to me to be a clear offer by the company to *Addinell* of four new shares upon certain terms, and there is added a request to be informed whether he would wish to have any further shares beyond the four offered; but as to any further shares there is no offer. To that circular was appended a form of letter, which *Addinell* filled up and returned to the secre-

(1) 19 L. J. (N. S.) Ch. 394. (2) 31 L. J. (N. S.) Ch. 241.

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tary, and as so filled up it was in these words: "I agree to take four shares, being my proportion of allotment, and my proportion of shares in addition, if I can have them." A question has arisen upon these words, what was intended by "my proportion of shares in addition;" but in my view of the case, that question is immaterial.

Now how does this answer bear upon the letter containing a distinct offer of four shares, and a request to know whether more was desired? It appears to me that it constitutes an absolute and unconditional acceptance of the offer of the four alloted shares; with the addition of a request for a further allotment; and that acceptance of the offer constitutes a binding contract as to the four shares. It is precisely the case of the owner of property writing a letter to another, offering to sell him the property upon certain terms, and the latter sending a letter in answer, containing an unconditional acceptance of the offer. That constitutes a binding contract.

But how does *Addinell's* answer operate with respect to any further shares? There is no contract constituted as to them, because there was no offer of any further shares in the secretary's letter; and therefore there could not be, as to them, any acceptance by *Addinell*. But *Addinell's* letter constitutes an offer by him to take his proportion of further shares, and if in reply to that, the secretary had written that the offer was accepted unconditionally, that would have constituted a contract as to further shares, subject to the question, what was meant by "my proportion of shares in addition." But instead of an unconditional acceptance, the reply sent to *Addinell* was in these terms: "The directors have allotted you four additional shares, for which you have applied, at the sum of £30 per share, in addition to the four shares previously accepted by you, making your number of new shares eight." Here the four first allotted shares are only mentioned incidentally, and the letter does not purport to deal with them in any way. Then comes this passage: "The amount to be paid to the bank on or before the 1st of October next, or the shares will be forfeited (if paid before that time interest will be allowed at £5 per cent.)." That is the same passage as occurred in the first letter, with the exception of the words, "or the shares will be

forfeited." In the first letter, which applied only to the first four shares, there was no clause as to forfeiture, and in my opinion that clause in the last letter applied only to the additional shares, and not to the four first allotted shares. So that, as to the additional shares, a new term was imported; and as nothing further took place, and no payment was made by *Addinell*, and nothing occurred to shew that *Addinell* accepted the additional shares with the superadded term as to forfeiture, there was no contract constituted as to those additional shares. The result is that there is a binding contract by *Addinell quoad* the first four allotted shares, but no contract as to the additional shares; so that Mr. *Addinell* must be put on the list in respect of four shares only.

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I must observe that the distinction between this case and *Barrett's* is, that after *Barrett* had received the last letter he went and paid for the additional shares, and that constituted an acceptance; but *Addinell* did nothing of the kind.

In Re BRITISH AND FOREIGN CORK COMPANY. LEIFCHILD'S CASE.

V.-C. K. 1865 Nov. 3.

Company—Winding-up—Ultra vires—Contributory—Patent—Paid-up Shares—Fraud—Nominal consideration.

Where a company is formed for working a patented machine, it is not *ultra vires* to purchase the patent.

A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration, provided such real consideration be not inconsistent with the deed.

If a case of fraud is alleged in respect of the formation of a company—*Semble*, it must be set up by bill, and not by proceedings under a winding-up order.

THIS was an adjourned summons to obtain the decision of the Court whether the name of *George Leifchild* should be placed on the list of contributories under the winding up of this company.

In the year 1852 a patent was obtained by *Robert Booty Cousens* for improved machinery in the cutting of cork, and this patent, after various assignments, became vested previously to the year 1860 in Messrs. *John* and *Robert Claypole*. In that year arrange-

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ments were made to form a company for the purpose of working the patent under the *Companies Act* of 1856.

The memorandum of association stated that the objects for which the company was established, were "the purchasing and selling of cork, and also the cutting of cork by the improved machinery for cutting cork, for which Letters Patent were granted to *Robert Booty Cousens*," and this memorandum was signed by seven persons agreeing to take shares amounting in the aggregate to 1400, of which *J. S. Claypole* took 840, and *R. M. Claypole*, 140. The articles of association were dated the 1st of May, 1860. By those articles, it was agreed among other things, that all shares subscribed for by the seven persons named in the memorandum of association should be considered and treated as paid-up shares.

By an indenture of assignment of even date with the articles of association, and made between *John Claypole*, *Robert Claypole*, and *Francis Newton*, the Messrs. *Claypole*, in consideration of 5*s.* paid to each of them, assigned to the said *F. Newton* the Letters Patent before referred to, and all the machinery and implements for cutting cork, and the stock in trade and trade effects, and also the lease of the dwelling-house, offices, and premises in *Esher Street*, *Westminster*, in which the business of cork-cutting had been previously carried on by the Messrs. *Claypole*, to hold the same upon trust for the benefit of the company.

Previously to the month of August, 1861, *John S. Claypole* transferred 329 shares in the company (being part of the 840 fully paid-up shares) into the name of *George Leifchild*, as a trustee for him, the said *George Leifchild* having no beneficial interest in such shares, and *George Leifchild* was registered as the proprietor of the 329 shares in the books of the company.

No money was ever paid in respect of the said 840 shares so issued by the company as paid-up shares.

The company being in course of winding up, the official liquidator sought to place *George Leifchild's* name on the list of contributories in respect of the shares now standing in his name, treating them as not being paid-up shares.

Mr. *Glasse*, Q.C., and Mr. *Fry*, for the official liquidator:—

The company had no power under the articles of association to

purchase the patent from the Messrs. *Claypole*, the object of the company, as stated in the memorandum and the articles, was the selling and cutting of cork by an improved machinery, not the purchase of a patent. There was nothing to lead the public to suppose that so large a sum was to be paid to the Messrs. *Claypole*. The contract was therefore fraudulent, and was not binding as against the creditors of the company.

It is clear from the cases of *Simpson* v. *The Westminster Palace Company* (1), and *The Australian Steam Company* v. *Maunsey* (2), that the company would not be allowed to apply the money of the shareholders to any purpose not within the scope of the proper business of the company, and the purchase of the patent was not within the scope of the articles of association. The *Claypoles* were put forward as the actual holders of a large number of shares, when, in fact, there was no capital possessed by the company, and *Leifchild* was now responsible in respect of all the shares for which he could not show payment. Payment must mean the passing of money, and here no money had passed. If there was an agreement to accept goods in lieu of money payment, then all the parties interested in the agreement should be before the Court. There were three parties to this bargain—the shareholders, the company, and the creditors, and no consent had ever been given by the creditors.

Nothing could be considered payment for the shares but money, except in case of all three parties agreeing to the contract.

No consideration could be proved for the deed of assignment beyond that which was stated in the deed. In the case of *Peacock* v. *Monk* (3), Lord *Hardwicke* held that you could not prove *aliunde* any other consideration, where there was a consideration expressed. Here the consideration expressed in the deed of assignment was 5*s.* to each of the assignees, and that did away with the right to prove any other consideration. They also cited *Ex parte Daniel* (4).

Mr. *Jessell*, Q.C., and Mr. *Mackeson*, for Mr. *Leifchild*:—

It was true that the actual purchase of the patent was not

(1) 2 D. F. & J. 141.
(2) 4 Kay & J. 733.
(3) 1 Ves. Sen. 127.
(4) 1 De G. & J. 372.

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specified in the memorandum or articles of association, but it was fully within the scope of the objects for which the company was formed, and it was understood by all parties that in order to work the patent it was to be purchased. There was no fraud whatever in the purchase; and the company had full power to pay the value of the patent in shares instead of money. It was perfectly understood what paid-up shares meant, and there was no reason for supposing that the public would be misled. But the original contract was not with *Leifchild*, and as far as he was concerned it was immaterial whether goods were given or not. The company placed the paid-up shares in the hands of Messrs. *Claypole*, and they transferred them to Mr. *Leifchild* as a trustee, and he might fairly say that though he consented to be a trustee of paid-up shares he would not have accepted them in that character, if there had been any liability attaching to himself. The company had no power to change the character of the contract from being a contract for paid-up shares, without the consent of both parties, and *Leifchild* could not be made liable without reference to the original transaction with the *Claypoles*. As for the consideration in the deed of assignment, it was decided in the case of *Clifford* v. *Turrell* (1), that where there was one consideration stated in a deed, proof might be given of any other consideration which took place and was not in contradiction to the instrument, and it was not in contradiction to the instrument to prove a larger consideration than that which was stated; that decision was confirmed upon appeal (2).

They also cited *Maxwell* v. *The Port Tenant Coal Company* (3).

Mr. *Glasse*, in reply, cited *The Official Manager of the Athenæum* v. *Pooley* (4).

SIR R. T. KINDERSLEY, V.C.:—

The facts in this case are hardly in controversy. It appears that there was a certain patent, which, after various mesne assignments, became vested in two persons of the name of *Claypole*. This patent related to a process of cutting and dressing corks,

(1) 1 Y. & Col. C. C. 138.
(2) 9 Jur. 633.
(3) 24 Beav. 495.
(4) 3 De G. & J. 294; 5 Jur. N.S. 119.

and, according to the fashion of the day, it was proposed to be worked by a limited company. A meeting accordingly took place, attended by all parties interested, including the owners of the patent, the Messrs. *Claypole*, with the object of forming the company and framing the necessary memorandum of association, specifying the foundation of the society and the articles of association, which may be regarded in the light of articles of partnership. Clause 3 of the Memorandum of Association specifies the objects of the company thus:—"The objects for which the company is established are the purchasing, selling, and cutting of corks by improved machinery, for which a patent was granted to Mr. *Beety Cousins*, on the 5th of November, 1852." It has been justly observed that this does not expressly specify as one of the objects of the company the purchase of the patent. Now if, in order to work the patent, it was expedient to purchase it, the purchase of it appears to me to be within the objects of these articles. Although, no doubt, they might have purchased only the privilege of exclusive use, still I think it was not inconsistent with the Memorandum of Association that they should purchase the patent itself.

The company was formed about May, 1860, and registered in June following, the Memorandum and Articles of Association being dated the 1st day of May. The agreement which was made between all the parties forming the association, including the Messrs. *Claypole*, was in effect this: that the Messrs. *Claypole* should assign to a trustee for the company all their interest in the patent; and that, in lieu of the company paying so much money, the Messrs. *Claypole* should have 840 shares, to be considered as paid-up shares of £5 each, representing, in money, £4200. That agreement was not only entered into by the parties, but it was made one of the articles in the Memorandum of Association, specifying the footing upon which the Joint Stock Company, limited, was to be carried on. Of these 840 shares, 329 are the subject of the present discussion. They were not bought by *Leifchild*, but *Claypole* desired to vest them in *Leifchild* as a trustee for him. Accordingly a transfer was made of the 329 shares to *Leifchild*, which, I presume, could not have been effected without the concurrence of the directors, and *Leifchild* stands in the books of the company as the holder of 329 shares. Now, if

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Leifchild is not liable to be placed in the list of contributories in respect of those 329 shares, it is not by reason that he only held them in trust, since the company were not bound to take notice of a trust. If he has, in other respects, made himself liable to be put upon the list, his being a trustee of the shares will not exonerate him from that liability. If he is not liable, it must be by reason that the shares which he holds are paid-up shares, and that the company being one with limited liability, the shareholders are not liable to the debts beyond the amount of their shares.

On the part of the official liquidator, it is contended that *Leifchild* is precluded from alleging that his shares are to be considered as paid up, because although in fact, and in truth, the consideration for the transfer of the *Claypoles'* interest in the patent was 840 paid-up shares, yet he is estopped from insisting upon that, by the terms of the deed of assignment, since the deed does not mention any consideration for the transfer, except the nominal consideration of 5*s.*; and it is contended that for this reason the Court must shut its eyes to the facts as to the original arrangement of the parties, and to the terms of the Articles of Association; and the case of *Peacock* v. *Monk* was cited, to shew that in the view of Lord *Hardwicke*, where a consideration is stated in the deed, and no reference is made to any other, that you are precluded from setting up any other consideration, because it would be inconsistent with the consideration stated in the deed. On the other hand, the case of *Clifford* v. *Turrell* was cited, to shew that Lord *Lyndhurst* did not concur in that dictum of Lord *Hardwicke's*. Now, supposing the law to be in accordance with Lord *Hardwicke's* dictum—that where there is a real specific consideration expressed in the deed, such as natural love and affection, it would be inconsistent to allege a pecuniary consideration, in my opinion that would not apply to the present case, where the only consideration expressed, is the nominal consideration of 5*s.*, for that may be regarded as no consideration at all for the purpose of the present question. A nominal consideration, as we all know, was originally introduced merely for the purpose of raising a use, and I see no inconsistency in alleging a substantial consideration not expressed in the deed. But further, the question here is not whether the deed is to be enforced, or whether it is invalid for want of a sufficient consideration; the question is,

whether I am precluded from looking at the real facts of the case by reason of the deed expressing only a nominal consideration; and it appears to me that I am not. The original agreement, binding on the company and the shareholders was, that the *Claypoles* should have the shares as paid-up shares; in return for which the *Claypoles* were to assign to a trustee for the company all their interest in the patent; and there is no suggestion of anything fraudulent, or of any trick by which the shareholders were deluded. The transaction was perfectly fair, as far as I can see.

It appears to me there is no reason why *Leifchild* should be put on the list of contributories unless he is liable to contribute, with other shareholders, to the payment of the debts of the company; and I think he is not liable. No other shareholder has a right to say to him, "You are bound to assist me to pay the debts of this concern."

But then it is contended, that assuming that to be so, as between shareholders, here there are creditors whose rights are to be considered. But the right of creditors is only to get payment of their debts from those shareholders who are liable to contribute to the payment, which the holder of paid-up shares in a limited company is not. Whether the creditors could obtain any relief by proving that the whole transaction of the formation of this company was fraudulent, and ought to be set aside, it is not necessary to inquire. No such case is alleged; and if it were, I apprehend that such relief could only be obtained by bill and not by proceedings under a winding-up order. And, at all events, *Leifchild* has been guilty of no fraud, but is merely in the position of a person who took shares, such as the company, by their Articles of Association, represented them to be, namely, as paid-up shares.

I am of opinion that Mr. *Leifchild* ought not to be put on the list of contributories. The official liquidator having only done his duty in coming here he must have his costs out of the assets, and he must pay Mr. *Leifchild's* costs, adding them to his own.

V.-C. K.
1865
Dec. 5.

CHURTON *v.* FREWEN.

Practice—Supplemental Answer—Mistake in Answer.

An application for leave to file a supplemental answer to correct a mistake in the original answer must be made by motion in Court, and not by summons in Chambers.

The Court will not grant leave to file a supplemental answer to correct a mistake in the original answer, without having materials before it to enable it to judge for itself as to there having been the alleged mistake.

THIS was a motion on behalf of the Defendants for leave to file a supplemental answer for the purpose of correcting an admission contained in their original answer, which they alleged had been made by mistake, and was erroneous.

One question in the suit was whether the Defendant *Frewen* was entitled, in right of his wife, to the freehold of a certain part of the chancel of the parish church of *Icklesham*, in the county of *Sussex*.

By their original answer, the Defendants, *Frewen* and his wife, had admitted that the freehold in the part of the chancel in question was vested in the Ecclesiastical Commissioners; and the present application for leave to file a supplemental answer was to correct this admission.

In support of the application, two affidavits were adduced, one by Mr. *Frewen* and his wife, and the other by their solicitor.

The affidavit of Mr. and Mrs. *Frewen* stated, that since the filing of the original answer, searches had been made by the Defendants in the registry of the diocese of *Chichester*, with a view to establish their title to the part of the chancel of the church in question; and that the result of the searches was the production of evidence which they were advised proved that the ancestors of the Defendant *Frances Frewen*, or the persons from whom they derived title, were originally the patrons of the said parish church, and that some or one of them founded and endowed the said church, and were owners of the soil on which the same was built; and that the said so-called southern part of the chancel was in fact an aisle or chapel, founded by the lord or lady of the

manor for his or their exclusive use, for the purposes of private prayer and for burial; and that in consequence of the evidence adduced by the searches, an architectural examination of the church had been made, and that such examination, so far as it could do so, supported the statement that it had been the private chapel of the lords of the manor. The affidavit then stated that the admission in the original answer had been made by mistake.

The affidavit of the Defendants' solicitor was to the same effect, and stated that when the copies of documents, the result of the searches, had been submitted to counsel, the opinion of counsel was, that the effect of such evidence then obtained appeared to negative the admissions in the Defendants' original answer, that the freehold in the chancel was in the Ecclesiastical Commissioners; and that Counsel had advised that a supplemental answer ought to be filed.

The application was originally made by summons at Chambers, when—

Mr. *Wintle*, for the Plaintiffs, raised the preliminary objection that the application to file a supplemental answer ought to have been made in Court, and not by summons at Chambers. He cited *Smith's* Chancery Practice (1); *Morgan's* Chancery Orders (2); *Chadwick* v. *Turner* (3); and *Livesey* v. *Wilson* (4).

The VICE-CHANCELLOR, in Chambers, ordered the matter to stand over to ascertain the practice, and subsequently decided that the application should have been made to the Court, and dismissed the summons with costs as against the other Defendants, the Plaintiff's costs to be costs in the cause.

The matter was now brought on by motion in Court.

Mr. *Charles Hall* and Mr. *Trail*, in support of the motion, asked that leave might be given to file the supplemental answer. The motion was supported by the affidavits of the Defendants themselves and their solicitor; and those affidavits were sufficient to satisfy the Court that the Defendants had, since filing their

(1) P. 334, 6th ed.
(2) 3rd ed. p. 433.
(3) 34 L. J. (N. S.) Ch. 62.
(4) 1 Ves. & Bea. 149.

V.-C. K. 1865 CHURTON v. FREWEN.

answer, discovered evidence which, they were advised by counsel, negatived the admission contained in their answer, which admission would, if not corrected, debar them from using efficiently such evidence on the hearing; and it was stated in the affidavit that counsel had advised that this was necessary. If the Court required the production of the evidence to satisfy itself before granting the hearing asked, it would in effect be a hearing of the case. If, however, the Court required it, the Defendants were willing to produce the documents to satisfy the Court.

Mr. *Glasse*, Q.C., and Mr. *Wintle*, for the Plaintiffs, were not called upon.

SIR R. T. KINDERSLEY, V.C.:—

The Court will not grant leave to file a supplemental answer, for the purpose of correcting an alleged mistake in the original answer, without having such materials before it as will enable the Court to satisfy itself that such a mistake has been made, and an affidavit stating in general terms the fact of the mistake having been made, is not sufficient. It has been said that counsel's opinion has been taken on the matter, and he has advised that it is necessary that a supplemental answer should be filed; but although I should always be very prone to accept the opinion of counsel, I think I ought not to be satisfied with this; but I must be in a position to judge for myself as to the fact of the mistake. I cannot, therefore, upon the evidence as it now stands, give leave to file a supplemental answer.

(The VICE-CHANCELLOR having heard Mr. *Glasse*, Q.C., and Mr. *Wintle*, for the Plaintiffs, and Mr. *Charles Hall* in reply, as to whether the Defendants should be allowed an opportunity of producing the documents, ultimately came to the conclusion that there was no evidence before the Court which would justify it in so doing, and refused the motion with costs.)

NOTLEY v. PALMER.

V.-C. K.
1865
Dec. 8.

Payment out of Court—Disentailing Deed.

Fund in Court exceeding 600*l.* paid out to tenant in tail without a disentailing deed having been executed.

THIS was a Petition by a lady who had attained twenty-one, and who was entitled as tenant in tail to a one-fifth share of a sum of £1657 East India stock in Court, to have it paid out to her; and the question was whether the Court would make the order without her executing a disentailing deed; the fund in question being a little over £600.

Mr. *G. Murray*, in support of the Petition, referred to a case of *Re South Eastern Railway Company* (1), in which the Master of the Rolls had ordered a larger sum to be paid out without requiring the execution of a disentailing deed.

The VICE-CHANCELLOR, on the authority of that case, made the order as asked by the Petition, without requiring a disentailing deed.

PEARSE *v.* DOBINSON.

V.-C. K.
1865
Nov. 23.

Practice—Plea—Former Decree—Enrolment—Fraud.

The rule of practice that a decree must be enrolled before it can be pleaded in bar of a second suit for the same matter was laid down only with reference to the case of bill and cross bill, and is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud.

Kinsey v. *Kinsey* (2) considered.

THIS was a bill filed for the purpose of setting aside a decree in a former suit, on the ground that it was fraudulently and improperly obtained. The Plaintiff in this suit was also Plaintiff in the former suit.

Three pleas were put in by the several Defendants, pleading the

(1) 30 Beav. 215. (2) 2 Ves. Sen. 577.

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former decree, and denying the fraud, but not averring that the decree had been enrolled, which pleas now came on for argument.

Mr. *Glasse*, Q.C., and Mr. *Roberts*, for the Plaintiff, raised a preliminary objection that there could not be a plea to a bill seeking to impeach the decree in a former suit for the same purpose, on the ground of fraud, unless the decree had been signed and enrolled. This rule had been laid down by all the books of practice, and was supported by authority. In the case of *Kinsey* v. *Kinsey* (1), the rule was distinctly stated by Lord *Hardwicke*, and in an anonymous case, in 3 Atk. 809, it was also held that a decree must be enrolled before you could plead it in bar to a second suit for the same matter. In Lord *Redesdale's* book (2), it was laid down in the same terms: "A decree must be signed and enrolled, or it cannot be pleaded in bar of a suit, though it may be insisted upon by way of answer." So also in *Storey's* Equity Pleading, 501. The words were: "In order to entitle a decree to be pleaded to a new bill for the same matter, it must be a decree signed and enrolled for the same subject matter, and substantially between the same parties." And the rule had been acted upon for the last hundred years.

Mr. *Baily*, Q.C., Mr. *Karslake*, and Mr. *Maskelyne*, in support of the first plea:—

Suppose the rule referred to in the two reports cited, which are evidently the same case, was a strict rule at the time of the decision, the reason upon which it was founded has ceased to exist, and therefore it ought not now to be acted upon. Formerly a party had an absolute right to have a cause reheard so long as the decree was not enrolled. After the enrolment, there was no longer any such right. Until a few years ago, there was no limit of time before enrolment at which a rehearing might not take place, but under recent orders the practice had been greatly changed, and now, under the 31st of the Consolidated Orders, a decree cannot be reheard after five years, except under special circumstances. At the expiration of that time, the decree is as effectual as if it had been enrolled under the old practice. In this case, the decree was dated in 1852, and therefore it could not now be reheard.

(1) 2 Ves. Sen. 577. (2) 4th ed., p. 239.

Formerly the only way to prevent a party from getting a rehearing was to have the decree signed and enrolled. This decree was not yet enrolled, and after the lapse of five years it could not now be enrolled, under the 23rd of the Orders, without a special application to the Lord Chancellor, based upon special circumstances; and no leave was likely to be given in a case of this nature, where the parties have proceeded to act upon the order. Since, therefore, the right to rehear has been lost, the parties are in the same position in which they would have been formerly after the signing and enrolment of the decree, and the reasons for the rule laid down in the authorities do not apply after a lapse of five years. The object of this bill is to set aside a decree on the ground of fraud. The whole question is fraud or no fraud, and the relief is based upon that issue. To make the authorities apply to this case, it must be shewn that fraud was in those cases also the ground of application. They cited *Codrington* v. *Codrington* (1).

Mr. *E. F. Smith*, Q.C., and Mr. *Dickinson*, for the second plea, cited *Bayley* v. *Adams* (2).

Mr. *G. H. Palmer*, Q.C., and Mr. *Surrage*, for the third plea.

Mr. *Glasse*, Q.C., in reply.

The Registrar's book, containing the case of *Kinsey* v. *Kinsey*, of the year 1754, was produced in Court; but nothing more was stated than the order, which was in conformity with the report in Ves. Sen.

SIR R. T. KINDERSLEY, V.C.:—

Practically, as far as concerns the interests of the parties to this suit, it does not signify much whether the pleas are overruled on this ground or not, because it is admitted that by answer the same defence may be raised. However, that is no reason why I should not give the question my best consideration.

It is clear that the foundation of the proposition upon which this preliminary objection rests — namely, that a decree or order in a former suit cannot be pleaded in bar unless it be signed and enrolled—is the anonymous case in 3 Atk. 809, and

(1) 3 Sim. 519. (2) 6 Ves. 596.

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Kinsey v. *Kinsey*, in 2 Ves. Sen. 577. These are evidently reports of one and the same case, and are admitted to be so. The rule, as stated in the marginal note of each of those two reports, has been adopted by every text writer on the subject of pleas; and thus it has come to be regarded as the settled and invariable rule of the Court. It does not appear, however, that there is any subsequent case in which that rule has been recognised or acted upon. It has been assumed by the counsel on both sides that no such case can be found; and I may safely assume that there is none. Still, if Lord *Hardwicke*, in that case of *Kinsey* v. *Kinsey*, had laid down such a rule, and the rule so laid down had been handed down from time to time by text writers, though never since acted upon by the Court, I should have desired that the matter should, if possible, have come before the Lord Chancellor or the Lords Justices; but there is no way of doing that without entailing on the appellate Court the necessity of going into the whole merits of the case, which I have no right to suggest that it should do.

Let us see, then, what really was decided in *Kinsey* v. *Kinsey*. Both the reports are very short; that in *Atkyns*, which is the shorter of the two, is this,—"A plea of a former suit and decree in bar to the present bill; it appearing that the decree was not signed and enrolled, Lord Chancellor would not allow of it, as it is the standing rule of the Court that you cannot plead in this manner before enrolment, and therefore directed it should stand for an answer, with liberty to except." There is here no allusion to the circumstances of the case,—whether the former bill, the decree in which was pleaded, was a bill by the same Plaintiff, or a bill by the Defendant, or whether the two bills were in the nature of a bill and cross bill. There is nothing in the report in Atkyns to lead to any conclusion as to the nature of the two suits. The report in Ves. Sen. gives much more information, although still not quite so full as might be desired. It commences thus:—"Plea of a decree in a former suit as having determined the matter, wherein the present Defendant was Plaintiff, and the present Plaintiff in his answer thereto insisted on the same matter he has charged by this bill, that there was a decree *nisi* by default, which was made absolute upon no cause shewn." From the report,

thus far, we see, at all events, that the suits were thus constituted: that the Defendant in the present suit had filed a bill against the Plaintiff in the present suit in respect of the same matter, and had obtained a decree against him (I think it signifies nothing that that decree was first *nisi*, and then made absolute—except that there was no hearing on the merits); and in that former suit the present Plaintiff had set up, by way of defence, the same matter which he alleged in his bill in the present suit." Then the report continues:—"It was said this bill was filed before that decree was made, and to have a discovery; that the decree cannot be pleaded because it was not signed and enrolled; and the caveat was entered to prevent enrolment, that the cause may be reheard, and both come on together." Such are the facts of the case as they appear in the report. Now, it is clear that the "present" bill could not have stated the decree in the former suit, because it was filed before that decree was made. Therefore the "present" bill was not a bill seeking to impeach the decree in the former suit, but the two bills were, in fact, bill and cross bill, each seeking relief in respect of the same subject; and the present Plaintiff had set up, by way of defence to the former suit, the very same matter that he was insisting on as his ground for relief in the "present" suit. But, further, it appears that the Plaintiff in the "present" suit had, by entering a caveat, prevented the enrolment of the decree, in order that he might get it reheard, and bring on the rehearing, together with the hearing of his own suit; and that was what justice required; but that justice would be defeated if the Plaintiff in the former suit had a right to insist that his decree was a bar to the present suit. At this time it is almost a matter of course that where there are bill and cross bill, each seeking relief in respect of the same matter, they should be heard together. But this was not the practice in that day, as appears from the Lord Chancellor's judgment. He says:—"The great objection to the Defendant" (that is, to the Defendant's plea) "is that the decree is not signed and enrolled. It is a matter of great consequence to the proceedings in this Court, for it often happens that the Court will not delay the original cause by reason of the defending of a cross bill. Indeed, generally the Court cannot do it, unless something appears to warrant it. So that the Plaintiff in the original suit often hap-

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pens to get a decree, but the Plaintiff in the cross bill may, by *caveat*, stop the enrolment for forty days, petition to rehear, and bring on both together. Then the question is, whether, by the strict rules, you can plead that decree, which is not signed and enrolled? you may insist on it by answer, but that is another thing. This cannot be insisted on by way of plea. Let it stand for an answer with liberty to except, and save the benefit to the hearing." Therefore the *ratio decidendi* of the Lord Chancellor in that case was simply this, that there being suit and cross suit relating to the same matter, and it not being then the practice to delay the hearing of the first suit till the second was ready, and so hear them both together, it would be unjust to allow the Defendant in the second suit to plead the decree obtained by him in the first suit in bar to the second suit, that decree not having been signed and enrolled by reason of the *caveat* which the Plaintiff in the second had entered, for the very purpose of obtaining a rehearing, and bringing on the two suits together for hearing. The marginal note is, "A decree cannot be pleaded in bar of a suit unless it has been signed and enrolled," laying it down as a universal proposition; and that marginal note has been copied into every text-book from the year 1764 down to the present time. That is the way in which the supposed rule originated.

Now it appears to me that the decision of Lord *Hardwicke* in *Kinsey* v. *Kinsey*, not only affords no warrant for the general rule laid down in the text-books, but that it has no application to the case now before the Court, which, instead of being a case of bill and cross bill, is a case of a bill filed to impeach an order, made in a cause in which the same person was Plaintiff, on the ground that it was obtained by fraud. The bill states the fact that such an order has been made, and impeaches it for fraud. As it is not stated on the pleadings to have been signed and enrolled, it is the same thing as if it had been stated that it was not signed and enrolled. I cannot conceive on what principle (certainly none of the reasoning of Lord *Hardwicke* in *Kinsey* v. *Kinsey* affords any) it ought to be held that you cannot insist on that order by way of plea negativing the alleged fraud, because it has not been signed and enrolled. If there be no fraud, the injustice of allowing the suit to go on would be equally

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great, whether the order has been signed and enrolled or not. If the non-enrolment of the order does not prevent the Plaintiff from filing a bill to impeach it on the ground of fraud, why should the non-enrolment of the order prevent the Defendant from defending himself by pleading the order, with proper averments, negativing the alleged fraud, and so bringing the matter to the short issue, fraud or no fraud, which is, in fact, the only question upon which the parties are at issue? The reasoning and the grounds of decision in *Kinsey* v. *Kinsey* do not in the smallest degree apply to such a case as this; and my conviction is, that if Lord *Hardwicke* had before him this very case that I have now before me, he would not have overruled the plea merely because the decree was not signed and enrolled.

I think the other ground that has been suggested on the part of the Defendant is not to be disregarded—that, supposing it were the rule in Lord *Hardwicke's* time, when there was a certain practice as to obtaining a rehearing at any time before the signing and enrolling, the practice being now altered, the rule should cease. But I go on the main ground, that Lord *Hardwicke's* decision was on a case and on a point entirely different from that which is now before me; and I cannot overrule this plea on the mere ground that the order has not been signed and enrolled.

In Re WILSON'S TRUSTS.

V.-C. K.
1865
Nov. 10, 11, 13, 14; *Dec.* 7.

Will—Marriage in England—Divorce in Scotland—Children—Eldest son lawfully begotten—Legitimacy.

A testator in England gave and devised real and personal estate, situate in England, to his great-niece for life, with remainder, as to the personalty, to her children, and as to the realty, to her first and other sons lawfully begotten, with remainders over. The great-niece, in 1830, married in England, but never lived with her husband, and a decree of divorce *a vinculo*, on the ground of the husband's adultery, was pronounced by the Court of Session in Scotland, the husband having been induced, with the wife's connivance, to go to Scotland to bring himself within the jurisdiction of the Scotch Courts. The great-niece, in 1846, married in Scotland an Englishman domiciled there, and had by him two daughters and a son, all born in Scotland, during her first husband's lifetime. Upon Petition by these three children claiming as

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children, the son claiming also as eldest son lawfully begotten, two funds representing portions of the testator's real and personal estate, which had been paid into Court:—

Held, that the English marriage being indissoluble, the decree of divorce pronounced by the Court of Session must be treated as a nullity; that the second marriage in Scotland was invalid, and therefore that the children, whatever might be their *status* in Scotland, must in England be treated as illegitimate; and could not, upon the construction of an English will by an English court, be held to come within the term "children" or "eldest son lawfully begotten," as used in such will, and were not entitled to the funds in Court.

THIS case came on upon two Petitions by persons claiming two funds in Court of £1800 and £800: representing respectively portions of the residuary personal and real estate of *John Wilson*, who died a domiciled Englishman. The real estate was situate in *England*.

The personal estate in question was given by the testator to the "children" of his great-niece and the real estate to her "first and other sons lawfully begotten." The great-niece married in *England* a Mr. *Buxton*, a domiciled Englishman, but subsequently obtained in *Scotland* a divorce from her husband on the ground of adultery; and afterwards married in *Scotland* an Englishman, domiciled there, of the name of *Shaw*, and had by him two daughters and a son born in *Scotland*, in the lifetime of the first husband; and the question which now arose was, whether these three children were, upon the construction of the will of *John Wilson*, entitled to the funds in Court, as being the "children," and, as to the son, the "eldest son lawfully begotten," of the testator's great-niece.

The facts of the case will be found more fully stated in the VICE-CHANCELLOR'S judgment.

The case upon which the opinion of two Scotch advocates, (referred to in the judgment) was taken, contained a short statement of the facts of the case, and was accompanied by copies of the two Petitions which now came on for hearing; and contained the following questions:—

"Assuming, first, that *Buxton's* going to *Scotland* was procured by the lady's friends, and among others the said *John Shaw*, but without the lady's privity; and secondly, that it was so obtained, but with the lady's privity and approbation.

"Query 1. Would the divorce and second marriage of Mr. and Mrs. *Shaw* be held good, and the children of that marriage legitimate for all purposes, according to the law of *Scotland*, unless and until the decree of divorce were set aside in an action of reduction?

"Query 2. According to the law of *Scotland*, could reduction of the decree of divorce on the ground of want of jurisdiction, or of collusion, or on any other ground, be now obtained? and what would be the effect of such reduction on the *status* of the children, or on their rights to a legacy bequeathed to the children of Mr. *Shaw*.

"OPINION.

"1. We are of opinion that the divorce and second marriage would be valid, and the children legitimate for all purposes, according to the law of *Scotland*, until the decree of divorce were reduced; and we are further of opinion that, although the assumptions on which this query is put were proved to be facts, these would not be relevant grounds of reduction of the decree of divorce.

"2. According to the law of *Scotland* reduction of the decree of divorce could not be pronounced after a year and day from the date of the decree, on the ground of want of jurisdiction or of collusion, or on any other ground suggested to us by the facts of this case.

"The second part of the query raises a question of a very peculiar character. As we understand the query, it proceeds upon the assumption that decree of reduction has been pronounced; and upon that assumption we are of opinion that the children are legitimate.

"The law of *Scotland*, from considerations of expediency and humanity, adopted the rule of the canon law, which recognized the legitimacy of children born of a putative marriage, that is, a marriage regular and solemn in point of form, but null in law because of the existence of an impediment, such as the prior existing marriage of one of the parties; both or either of the parties being ignorant of the subsistence of that prior marriage. If either of the parties be justifiably ignorant of the

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impediment, the children are legitimate; and it is in our opinion a justifiable error, if both or either of the parties should have married on the faith of a decree of divorce and have children, although the decree should thereafter be reduced. In such a case the children of such marriage would be, in our opinion, legitimate according to the law of *Scotland*.

"In this case the plea to the jurisdiction of the Court was taken and repelled; and this judgment of Lord *Wood* was in accordance with the law of *Scotland*, as understood by *Scottish* lawyers, at the time when that judgment was pronounced. The correctness of that judgment may now be doubted, in consequence of the recent decision of the House of Lords in *Pitt* v. *Pitt* (1). But, in the present question of legitimacy, the law would, we are of opinion, be held to have been rightly delivered by Lord *Wood*, and the decree of divorce would be regarded as a sufficient ground for recognizing the legitimacy of the children; and this, even although the marriage between *John Shaw* and *Elizabeth Hickson* were held to be null.

"The opinion of,

"*Edinburgh*, "D. MACKENZIE,

"29th of April, 1865." "PATRICK FRASER."

Mr. *Anderson*, Q.C., and Mr. *Archibald Smith*, in support of the *Shaws*' Petition:—

The *Scotch* decree was sufficient to dissolve the English marriage; and thus Mrs. *Buxton's* marriage with *Shaw* was valid in *Scotland*, and must be treated as valid everywhere; and the children of the marriage are legitimate in *Scotland*, and must be held legitimate everywhere.

The validity of a marriage must be determined according to the *lex loci contractus*—the law of the country where it was solemnized; and the marriage being valid in *Scotland* must be treated so in this country: *Warrender* v. *Warrender* (2); *Dalrymple* v. *Dalrymple* (3); *Shrimshire* v. *Shrimshire* (4).

Brook v. *Brook* (5) differs from the present case, the marriage there being within the prohibited degrees. The cases of *Birtwhistle*

(1) 4 Macq. 627. (2) 1 Bli. 89. (3) 2 Hagg. Con. C. 86.
(4) 2 Hagg. Con. C. 408. (5) 9 H. L. C. 193.

v. *Vardill* (1) and *Re Don's Estate* (2) were decided on the ground of the English law of inheritance; these two cases are not against the *Shaws'* contention, but rather in their favour, as they shew that, although an *antenatus* cannot take under the laws of inheritance, still in all questions of *status* the legitimacy is upheld.

Lolley's Case (3) is somewhat similar to the present, but in that case the second marriage was in *England*, and not, as in the present case, in *Scotland*. Scotch lawyers have been of opinion that *Lolley's Case* was not correctly decided, and Lord *Brougham*, in *Warrender* v. *Warrender* (4), appears to have taken the same view. Dr. *Lushington*, in *Conway* v. *Beazley* (5), said he did not concur in the indissolubility of an English marriage. There is a difference of opinion between Scotch and English lawyers on the subject; and the Court must decide according to the Scotch law, which it will ascertain as a matter of fact in the ordinary way.

At the time of the marriage the domicil of the parties was Scotch, as it was in *Warrender* v. *Warrender* (6), where the Court sustained the Scotch divorce on that ground; and in that case the indissolubility of an English marriage was repudiated.

Assuming, however, that *Lolley's Case* (7) was rightly decided, the question here is as to the *status* of the children and not of the parents; and the Court, adapting the language of Lord *Stowell* in *Dalrymple* v. *Dalrymple* (8) to the present case, will leave that legal question to the law of *Scotland*. No doubt anomalies may arise as in *Simonin* v. *Mallac* (9); and as was also suggested by Lord *Brougham* in *Warrender* v. *Warrender* (10).

The *status* of the children depends on the domicil of their father, and that being *Scotch* at the time of their birth, the children of *Shaw's* marriage are legitimate by the *Scotch* law *Re Wright's Trusts* (11).

Dolphin v. *Robins* (12) was not a question of personal *status;* and in *Pitt* v. *Pitt* (13) the question was one of domicil.

(1) 2 Cl. & F. 571.
(2) 4 Drew. 194. 3 Jur. N.S. 1192.
(3) 2 Cl. & F. 567.
(4) 2 Cl. & F. 546.
(5) 3 Hagg. Ecc. 639.
(6) 2 Cl. & F. 488.
(7) Russ. & Ry. C. C. 237.
(8) 2 Hagg. Con. C. 59.
(9) 2 Sw. & Tr. 67. 6 Jur. N.S. 560
(10) 2 Cl. & F. 547.
(11) 2 K. & J. 610. 2 Jur. N.S. 465.
(12) 7 H. L. C. 390; 3 Macq. 563. 5 Jur. N.S. 12
(13) 4 Macq. 627. 10 Jur. N.S. 725

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The only case which militates against the Petitioner's contention is *Boyes* v. *Bedale* (1); but the authority of that case is denied; and it is opposed to *Goodman* v. *Goodman* (2).

[They also referred to *Tovey* v. *Lindsay* (3), *Munro* v. *Munro* (4), *Dalhousie* v. *McDouall* (5), and *Ferguson's* Divorce Reports in the Consistorial Court (6).]

According to the Scotch law as stated in the opinion of the two Scotch advocates (7), if there be an impediment, such as the existence of a former marriage, to the validity of a marriage, of which impediment both parties or either of them are justifiably ignorant, the children of such marriage are nevertheless legitimate. Mr. and Mrs. *Shaw* committed a justifiable error in marrying on the faith of the efficacy of a divorce pronounced by the Scotch Courts, which would have the same effect as a divorce by an act of the legislature of a foreign state; which, though it might not be recognised in *England*, would still legitimatize the children in such foreign state.

The case of collusion which has been suggested cannot prevail. To invalidate a divorce which has been pronounced, there must be collusion for the purpose of raising the cause of action, or such a fraud as would invalidate the whole proceedings, as in *Shedden* v. *Patrick* (8); nothing of the kind is suggested here. Moreover, to set aside a decree of divorce an allegation of collusion must be brought within one year and one day. In the act constituting the English Court of Divorce (20 & 21 Vict. c. 85), although section 30 provides that the Court may dismiss a petition on the ground of collusion, there is no provision for setting aside a decree once pronounced on that ground. And even supposing that there was collusion, Mrs. *Shaw* was not mixed up in it.

Sir *Hugh Cairns*, Q.C., and Mr. *G. N. Colt*, for the Petitioners on *Moore's* Petition, who were Respondents to *Shaw's* Petition:—

The decree of divorce of the Court of Session was utterly invalid both by English and Scotch law, the parties being domiciled (*i.e.*,

(1) 1 H. & M. 798.
(2) 3 Giff. 643. 8 Jur NS 557
(3) 1 Dow. 117.
(4) 7 Cl. & F. 842.
(5) 7 Cl. & F. 817.
(6) Pp. 23, 168, 209, 226, 257, & 336.
(7) Set out ante.
(8) 1 Macq. 535.

having their legal domicil) in *England*. With regard to the English law there are the observations of Lord *Brougham* on *Lolley's Case*, in *McCarthy* v. *Decaix* (1), and *Dolphin* v. *Robins* (2). With regard to the Scotch law, the opinion of the Scotch advocates goes only to the state of the law when the case was decided by Lord *Wood*, and they do not state that it is the state of the law at the present time. All the decisions ending with *Pitt* v. *Pitt*, a summary of which is contained in *Hubbock* on Succession (3), go to this, that there is no jurisdiction to dissolve an English marriage.

The decree of divorce was obtained by collusion, not in the meaning in which collusion was used in *Crewe* v. *Crewe* (4), as giving rise to the cause of divorce as committing adultery, but that persons domiciled and being amenable to English law concurred in submitting themselves to a foreign jurisdiction, and went through the forms necessary to induce a foreign tribunal to take jurisdiction, and went through the farce under the appearance of *litis contestatio*, of defending the action. This was done by Mrs. *Shaw* through her agents, and such collusion was held in *Dolphin* v. *Robins* (2), to be sufficient to invalidate the whole proceeding.

The marriage with *Shaw* was void, and not voidable only.

Assuming that a marriage, as to one or both of the parties to which there was an impediment of which they or one of them was justifiably ignorant, will not render the children illegitimate, still in this case there was no such ignorance; on the contrary, the parties knew of the impediment, and did all they could to get rid of it.

It is said that the law of the domicil of the children must determine their *status* as to legitimacy. But the domicil of a bastard child is the domicil of its mother (5), and the domicil of the mother is English, she being the wife of an Englishman, as in *Dolphin* v. *Robins* (2), and in *England* the children being illegitimate, that illegitimacy is indelible: *Re Don's Estate* (6).

Assuming that in *Scotland* the children are legitimate, still

(1) 2 Russ. & My. 619.
(2) 7 H. L. C. 390.
(3) P. 335.
(4) 3 Hagg. Ecc. 130.
(5) Story Conf. of Laws, ss. 46, 87; Phill. 237.
(6) 4 Drew. 194.

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they are not children under that term as used in an English will, which must mean born *ex justis nuptiis*. An English will must be construed according to the principles of English law: *Boyes* v. *Bedale* (1).

Mr. *Jessel*, Q.C., and Mr. *Melville*, for *John Wilson Moore*, who claimed to be interested both in the personalty and the realty, contended that, whatever children might be held to mean, "eldest son lawfully begotten" could only mean the son born of a lawful husband. They referred to *Lolley's Case* (2), *Re Don's Estate* (3), *Re Wright's Trusts* (4), *Boyes* v. *Bedale* (1).

Mr. *Renshaw*, Mr. *Owen*, and Mr. *C. Russell*, for the trustees.

Mr. *Anderson*, in reply.

The following cases were also referred to: *Harris* v. *Harris* (5) *Geils* v. *Geils* (6), *Yelverton* v. *Yelverton* (7), *Callwell* v. *Callwell* (8), *Gethin* v. *Gethin* (9).

Dec. 7. VICE-CHANCELLOR SIR R. T. KINDERSLEY:—

In this case two Petitions are presented under the *Trustee Relief Act* by parties claiming adversely to each other to be beneficially entitled to two funds in Court, one of which funds represents a moiety of the personal estate of one *John Wilson*; and the other represents a portion of his real estate.

John Wilson, by his will, dated the 27th of February, 1832, gave one moiety of his personal estate in trust for his great-niece, *Elizabeth Hickson*, for her life, and after her death, upon certain trusts for the benefit of her children, and in default of children of *Elizabeth Hickson*, upon trust for his nephew *Ambrose Moore*. And the testator devised his real estate to the use of trustees during the life of his great-niece, *Elizabeth Hickson*, for her separate use with remainder to the use of the same trustees for 500 years,

(1) 1 H. & M. 798.
(2) Russ. & Ry. 237.
(3) 4 Drew. 194. 3 Jur. N.S. 1192
(4) 2 K. & J. 610. 2 Jur. N.S. 1465.
(5) 1 Hagg. Ecc. 351.
(6) 1 Macq. 255.
(7) 1 Sw. & Tr. 574.
(8) 3 Sw. & Tr. 259.
(9) 31 L. J. (N.S.) Prob. 43.

upon trust to raise portions for the younger children of *Elizabeth Hickson*, with remainder to the use of the first and other sons of *Elizabeth Hickson* lawfully begotten in tail, with remainder to the use of the daughters of *Elizabeth Hickson*, lawfully begotten as tenants in common in tail, with remainder to the use of *Ambrose Moore* for life, with remainder to the use of his first and other sons in tail, with remainder to the use of his daughters as tenants in common in tail, with remainder over.

The Petitioners in the first Petition, who are three infants of the name of *Shaw*, claim the fund which represents the moiety of the personal estate as being (as they allege) the children of *Elizabeth Hickson;* and the male infant claims to be entitled as tenant in tail to the other fund which represents a portion of the real estate as being (as he alleges) the first son of the body of the said *Elizabeth Hickson* lawfully begotten.

The Petitioners in the second Petition are *Ambrose Moore* and his daughters, who contend that the *Shaws* are not the lawful children of *Elizabeth Hickson*; that she died without a lawful child; and that therefore *Ambrose Moore* is entitled absolutely to the fund representing the moiety of the residuary personal estate; and that he is entitled to a life interest in the fund representing the real estate with remainders over, under which the other Petitioners, his daughters, have an interest.

The circumstances under which the questions arise are of a somewhat remarkable character.

In 1828, *Elizabeth Hickson*, being then a girl of about sixteen, was induced by fraud, without the knowledge of her family, to consent to a marriage with a farmer named *Buxton*. The marriage was solemnized at *Manchester* on the 10th of June, in that year, but on the same day her friends interfered and got possession of her, and separated her from her husband, and they never lived together for a single day. *Buxton* was indicted for his conduct in bringing about the marriage, and convicted and sentenced to three years' imprisonment. Steps were taken to procure an Act of Parliament to dissolve the marriage, but without success.

After many attempts to recover possession of his wife, *Buxton*, in 1838, was induced, in consideration of a sum of money paid to him, and of an annuity during the joint lives of himself and his

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wife, to consent to a deed of separation, which was accordingly executed in December, 1838.

No question is now raised as to the validity of the marriage with *Buxton*.

In 1844, one *John Shaw*, who had been a chemist at *Derby*, but who was then a student of *Gray's Inn* preparing for the bar, fell in love with Mrs. *Buxton* (or *Elizabeth Hickson*, as she continued to be called), and addressed her with a view to marriage. His addresses were favourably received by *Elizabeth Hickson* and her mother; but the existing marriage with *Buxton* was a bar to their wishes. In order to remove that impediment the parties devised the scheme of procuring a dissolution of the marriage with *Buxton* by a sentence of the Court of Session in *Scotland*, on the ground of adultery committed by *Buxton*; and in order to give that Court jurisdiction, *Buxton* was prevailed upon by pecuniary inducements to go and remain in *Scotland* for forty days, and thereupon Mrs. *Buxton* raised an action against him in the Court of Session for a divorce on the ground of adultery, which there is no doubt he had committed. The suit was carried on with all due solemnity, and it ended in a sentence of divorce *a vinculo* being pronounced by the Court on the 20th of March, 1846. On the 17th of June, 1846, a marriage was solemnized at *Edinburgh* between *John Shaw* and *Elizabeth Buxton*, who thenceforth resided in *Scotland* as man and wife; and the three infant Petitioners in the first Petition are the fruit of that cohabitation, all of them having been born in the lifetime of *Buxton*. *John Shaw* changed his destination from the English to the Scotch bar; at which latter bar he continued to practise till his death. And there seems no doubt he abandoned his English and acquired a Scotch domicil. *Buxton* died in 1852. *John Shaw* afterwards died, leaving *Elizabeth Shaw* surviving him, and she died in 1863.

On the part of the *Shaws*, the infant Petitioners in the first Petition, it is contended:—

1st. That the marriage with *Shaw* was a valid marriage, and therefore that the Petitioners are the children of *Elizabeth Shaw* lawfully begotten.

2ndly. That even if the marriage with *Shaw* was not a valid

marriage, yet by the law of *Scotland* the children are, under the circumstances of the case, to be regarded as legitimate.

The argument in support of the *Shaws'* contention, that the marriage with *Shaw* was a valid marriage, is based upon this proposition: that it is an established principle of international law, and therefore a part of the law of every Christian civilized country, that whensoever questions arise as to the validity, or the incidents, or consequences of a marriage, those questions must be determined by the Courts of the country in which they arise according to the law of the country where the marriage was solemnized, *i. e.*, according to the *lex loci contractûs*, and not according to the *lex fori*. And applying that general proposition to the case now before the Court, it is contended that as the marriage with *Shaw* took place in *Scotland*, this Court must decide all questions relating to the validity or incidents or consequences of that marriage by the law of *Scotland;* and that according to the law of *Scotland* (as it was asserted), the marriage with *Shaw* was a valid marriage, because, according to the law of *Scotland*, the prior marriage with *Buxton* had been absolutely dissolved by the decree of the Court of Session.

Such is in substance the reasoning by which the validity of the marriage with *Shaw* and the consequent legitimacy of the children are maintained. Now it is curious to observe how the whole argument is founded upon the tacit assumption that it is competent to the Court of Session in *Scotland* to ignore or to violate the very principle of international law upon which the argument rests; and which, it is insisted, is binding upon the English Courts. I say that to assert the validity of the Scotch divorce, upon which alone the validity of the marriage with *Shaw* depends, is to assert that the Court of Session is not bound by that principle of international law before mentioned; viz., that all questions as to the validity, or incidents, or consequences of a marriage are to be decided according to the *lex loci contractûs, i. e.*, the law of the country where it was solemnized. The marriage with *Buxton* was solemnized in *England* where both were domiciled. By the English law of marriage, an English marriage is absolutely indissoluble by the sentence of any Court (of course I am speaking of the law as it stood at the time of the transactions

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in question, which was long before the passing of the Act establishing the Divorce Court.) The law of this country did not recognise the right or authority of any Court, whether domestic or foreign, to dissolve an English marriage for any cause or upon any pretext whatever; and any decree or judgment or sentence of any foreign Court, purporting to dissolve such marriage, is treated as a mere nullity. This was solemnly decided in *Lolley's Case*. In decreeing a dissolution of the marriage with *Buxton*, the Court of Session took upon itself to disregard this quality of indissolubility which the law of *England* attaches to an English marriage; and dealt with the marriage with *Buxton* not according to the law of *England*, where it was solemnized, but according to the law of *Scotland*, *i. e.*, not according to the *lex loci contractûs*, but according to the *lex fori*. In so doing, the Scotch Court violated that very principle of international law which is now invoked by the *Shaws* as a reason for maintaining the validity of the marriage with *Shaw*. The sentence of divorce pronounced by the Court of Session must be treated by this Court and by every English Court as a mere nullity and as wholly inoperative to dissolve the marriage with *Buxton;* and as that marriage remained undissolved, of course the marriage with *Shaw* was not a valid marriage.

I may observe, that if the validity of the marriage with *Shaw* were to be recognised by the Courts of this country, this consequence would necessarily follow, that an English Court of justice must hold that *Elizabeth Hickson* had two husbands simultaneously, *Buxton* and *Shaw*. The monstrous consequences which would flow from so holding are too obvious to require to be pointed out. Whether such a state of things is possible by the law of any other civilized Christian country it is unnecessary to inquire; all I need say is that it is absolutely impossible by the law of *England*.

Upon the first point, then, I am clearly of opinion that the marriage with *Buxton* remained entirely unaffected by the sentence of divorce pronounced by the Court of Session; and, consequently, that the marriage with *Shaw* was not a valid marriage.

The second point upon which it is attempted to maintain the legitimacy of the *Shaw* children, notwithstanding the invalidity of the marriage with *Shaw*, is this. It is said that in *Scotland* if a

marriage is solemnized between a man and a woman, there being at the time an existing prior marriage of one of the parties with another person, although the impediment of such prior marriage is fatal to the validity of the marriage which the parties have contracted together, yet if either party was justifiably ignorant of the existence of that impediment, the law of *Scotland*, from considerations of expediency and humanity, adopting the rule of the canon law, holds the children of the putative marriage to be legitimate; and it is contended that both *Shaw* and *Elizabeth Hickson* were, or at all events that the latter was, justifiably ignorant of the existence of the impediment of the marriage with *Buxton;* because they were justified in assuming that it had been annulled by the decree of the Court of Session; and on this ground it is contended that the *Shaw* children are legitimate by the law of *Scotland*; and that their personal *status* in *Scotland* being that of legitimate children, that *status* must be recognised in all other countries.

In support of this contention the opinion of two eminent Scotch advocates is produced, in which they state the general proposition of law to the effect above mentioned, and which I therefore receive as sufficient evidence that the law of *Scotland* is as alleged by the *Shaws*. The learned advocates further express their opinion that it is a justifiable error if both or either of the parties should have married on the faith of a decree of divorce, and have children, although the divorce should be afterwards reduced; and that in such a case the children of such marriage would be legitimate according to the law of *Scotland*. They do not, however, appear to me to address themselves to the question whether under all the circumstances of the particular case as detailed in the Petition of the *Moores*, Mrs. *Buxton* and *Shaw* could be considered as justifiably ignorant of the existence of the impediment arising from the marriage with *Buxton*.

I confess it appears to me that the question, whether, having regard to the real facts of the case as they are proved in evidence, *Shaw* and *Elizabeth Buxton*, or either of them, can be considered to have been justifiably ignorant of the marriage with *Buxton* constituting an impediment to their intermarrying together, that is (in other words), whether they were justified in assuming

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that the decree of the Court of Session operated as an absolute dissolution of the marriage with *Buxton*, is a question of some difficulty. But, after much consideration, I have arrived at the conclusion that neither of them was justified in that assumption. No doubt, abstractedly, a person may be well justified in putting faith in a decree pronounced by one of the Superior Courts of his own country, or indeed of any civilized country; but here it is proved conclusively, that the proceedings which terminated in the decree of the Court of Session, were the result of a scheme concerted between *Shaw* and Mrs. *Buxton*, and her friends, on the one side, and *Buxton* on the other, in order to obtain a decree of divorce and enable *Shaw* and Mrs. *Buxton* to intermarry. I include Mrs. *Buxton* among the persons by whom the scheme was concerted; because, although of course it is impossible to prove her cognizance or participation in each particular step, yet it seems to me not to admit of a doubt that she was privy to, and concurring and assisting in, all that was done. The evidence clearly shews that the course of proceeding was as follows. The first step taken was that a suit was commenced by Mrs. *Buxton* against her husband in the Court of Arches in *England*, for a divorce *a mensâ et thoro*, on the ground of his adultery. This step was taken without *Buxton's* connivance; and it was taken with a view to alarm him as to the continuance of his annuity under the separation deed, and thus make him more disposed to listen to the overtures which it was intended to make to him. The device succeeded. *Buxton*, as soon as he was served with the citation, in his alarm went and consulted his intimate friend, Dr. *Cantrell*, of *Wirksworth*, and through him he consulted Mr. *Hodgkinson*, a solicitor. Negotiations were then opened on the part of Mrs. *Buxton* with these two gentlemen and *Buxton*, in which *Shaw* and a friend of his named *Bull* took an active part, and which terminated in a precise and formal written agreement, to the effect that, in consideration of the annuity which had been provided for him by the separation deed of 1838 being continued to him, and of other pecuniary benefits which he was to receive, he should go to *Scotland*, under the pretence of his being employed by Mr. *Bull* to collect agricultural statistics for him in that country; and that he should remain there till

a summons for a divorce should have been served upon him; forty days' residence in *Scotland* being requisite to render him amenable to the jurisdiction of the Court of Session, and that his expenses in *Scotland* should be defrayed for him. One of the stipulations of the agreement was to this effect, that in case *Buxton* should be divorced from his wife he should be paid £250 within three months from the death of Mrs. *Wayte* (the mother of Mrs. *Buxton*) with interest thereon until that time, from the date of the divorce at the rate of three per cent. per annum, and it was provided that, in case *Buxton* should, either by himself or by any one through him, give information which should be prejudicial to the divorce, the said sum of £250 should be forfeited by him together with all interest thereon. And it was further agreed that *Buxton* should give a promissory note in the sum of £250, to be renewed as often as necessary, to prevent the operation of the *Statute of Limitations*, which note should only be enforced in case he, or any one through him, should give information which should be prejudicial, and he should have received the beforementioned sum of £250, or should refuse to renew the note when necessary. It was further agreed that the charges of *Hodgkinson*, the solicitor of *Buxton*, should be paid by *Shaw*, and that *Buxton* should not pay any legal expenses if he fulfilled the agreement.

In pursuance of that agreement *Buxton* went to *Scotland*, and in due time an action for divorce was raised against him in the Court of Session, by Mrs. *Buxton*. Some stress has been laid by the learned counsel for the *Shaws*, on the details of the proceedings in the divorce suit in the Court of Session, as indicating the intention of *Buxton* to resist a decree for divorce; and more particularly on the circumstance that *Buxton* actually raised the defence that the Court had no jurisdiction to decree a divorce against him, he being a domiciled Englishman. It is argued that the course pursued by *Buxton* in raising this defence, and also the defence denying the adultery, by which it was necessary to send a commission into *England* to examine witnesses as to the fact of adultery, is unmistakable proof that so far from there being any collusion or connivance between him and his wife, or their friends and advisers, he was *bonâ fide* intent on resisting a divorce by every means in his power,

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and availed himself of every possible defence which was open to him for that purpose. Now, when I advert to the terms of the agreement he had just entered into, and when I recollect that, if his object really was to prevent a divorce, he had only to stay quietly at home and decline to cross the border into *Scotland*, I confess it appears to me that it would require a marvellous degree of credulity in any one to make him believe that *Buxton* raised any defence or took any step in that suit with a *bonâ fide* intent to defeat his wife's object in suing for a divorce. For my own part, I am entirely convinced that *Buxton* raised no defence and took no step in that suit, but what was prescribed or sanctioned by the friends and advisers of Mrs. *Buxton*. And there was good reason why they should think it expedient that those defences should be raised on the part of *Buxton*.

It was of the utmost importance to the success of the scheme, that everything relating to the suit should wear the appearance of perfect *bona fides*, and that nothing should be done or omitted which could raise the least suspicion of collusion or connivance. The evidence shews what intense anxiety was felt upon this subject by Mrs. *Buxton's* party. The defences in question were too obvious to be prætermitted without exciting suspicion, and I have not the smallest doubt that they were raised by the direction, or with the sanction, of Mrs. *Buxton's* advisers. How they were supported does not appear; we find them on the record, and that is all we know of the matter.

It being then clear, in my opinion, that the decree of divorce was obtained by means of collusion and connivance between and among Mrs. *Buxton*, and *Shaw*, and *Buxton*, and their several friends and advisers, the point for consideration is how do *Shaw* and Mrs. *Buxton* stand with reference to the question whether they or either of them were, or was, at the time when they went through the ceremony of marriage together, in June, 1846, justifiably ignorant of the impediment arising from the subsistence of the marriage with *Buxton*. Being both English, they must be taken to have known that by the law of *England* the English marriage could not be dissolved. That they knew it could not be dissolved by any English Court is not mere matter of presumption but of fact; for otherwise they would not have

resorted to a foreign Court. They took their chance of what the decree of that foreign Court could do for them, and they procured that decree by the collusion and connivance of the English husband. In the face of these facts I cannot bring myself to the conclusion that either *Shaw* or Mrs. *Buxton* can be held to have been justifiably ignorant of the impediment occasioned by the subsistence of the marriage with *Buxton*.

But supposing that this were otherwise, and that they were justifiably ignorant of the impediment, and that consequently, by the law of *Scotland* the personal *status* of the children born of their cohabitation is that of legitimate children, and that such personal *status* must be recognised in England by rules of international law, there is a question still remaining for consideration, viz., whether this personal *status* thus acquired brings the infant *Shaws* within the description of the persons to whom the real and personal estates are respectively limited by the testator's will according to the true intent and meaning thereof.

By the terms of the devise of the real estate it is limited after the death of *Elizabeth Hickson*, and subject to the 500 years' term, to the use of the first son of the body of *Elizabeth Hickson*, lawfully begotten or to be begotten in tail. Is the infant Petitioner, *John Horatio Wilson Shaw*, a son of *Elizabeth Hickson*, lawfully begotten? Of course, a child to be lawfully begotten must be begotten by the lawful husband of the mother, he must be *ex justis nuptiis procreatus*. The lawful husband of *Elizabeth Hickson* was *Buxton*, and *ex concessis*, the child was begotten by *Shaw*; how then can he be a son lawfully begotten?

With respect to the personal estate, the language of the will is different. After the death of *Elizabeth Hickson*, and subject to her powers of appointment (which she never exercised), the gift is to all and every the children or child of *Eliazbeth Hickson*, who, being a son or sons, should attain twenty-one, or being a daughter or daughters, should attain that age or marry. There are not the words "lawfully begotten." Now the will being a will made in *England*, by an Englishman domiciled in *England*, must be construed according to the law of *England*. Every term in it must receive that interpretation which belongs to it according to English

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law. What is the interpretation which the law of *England* gives to the term "Children?" Undoubtedly children lawfully begotten *ex justis nuptiis procreatos;* unless indeed there be something in the context which satisfies the Court that the testator meant to use the expression in a different sense. Is there anything of that nature in this will? So far from it, I think the whole will shews that the testator, by the term "children," meant such only as were lawfully begotten. It is difficult to suppose that he could have intended to include any in the gift of the personal estate who would be incapable of taking the benefit of the devise of the real estate. Suppose Mrs. *Buxton* had children by *Buxton* born either before or after the births of the *Shaw* children, could it be contended that the children by *Shaw* would share in the personal estate with the children by *Buxton?* Suppose (for of course this might have happened), that after the births of the children by *Shaw*, Mrs. *Buxton* had cohabited with her husband, *Buxton*, and had by him a son, and several other children, which of the two would have been entitled to the remainder in tail expectant on their mother's death; the son of *Shaw*, who was the elder, but not lawfully begotten, or the son of *Buxton*, who was the younger, but lawfully begotten? Clearly the latter. Who then would be entitled to the benefit of the portions for younger children, raisable under the 500 years' term. Would the children by *Shaw* participate as younger children, with the younger children by *Buxton?* And would the son by *Shaw*, though older than the son by *Buxton*, also participate in the portion money as a younger child; though he would be incapable of taking the estate itself, which would go to the son by *Buxton*, who would be his junior? Surely, the only children who could be intended to take the benefit of the 500 years' term were such children as were capable of taking the benefit of the devise of the estate itself; and I think it is equally certain that those only could be intended to take the benefit of the bequest of the personal estate who were capable of taking the benefit of the 500 years' term with the addition of the son who would take the real estate as tenant in tail.

Two cases have been cited as bearing upon this point. One is *Goodman* v. *Goodman*, decided by the Vice-Chancellor *Stuart* in 1862. There an English testator gave a share of his estate and

effects in trust for his son, *Leyon Goodman*, for his life, and after his death in trust for his children in equal shares. An inquiry having been directed whether *Leyon Goodman* left any and what children, the chief clerk certified that *Leyon Goodman* had three children, born respectively in 1815, 1818, and March, 1820, in *London*, by one *Charlotte Smith*, not his wife; that in 1820 he left *England* with the intention of permanently residing abroad, and went to *Amsterdam*, whither he was followed by *Charlotte Smith* and the three children, and where he resided till 1826, and that from that date till his death in 1832, he resided at *Brussels*. *Amsterdam* and *Brussels* were at that time in the kingdom of the *Netherlands*. That while at *Amsterdam* he had another child by *Charlotte Smith*, born in 1821. That in June, 1822, at *Amsterdam*, he married *Charlotte Smith*, and that by the act or register of marriage it was declared that the parents intended to legitimate all the four children before mentioned. After the marriage they had a fifth child, born at *Amsterdam*. The certificate also stated the opinions of three advocates, that according to the law in force in the *Netherlands* at the time, the children born before marriage could be legitimatized, and that, by the same law, *Leyon Goodman* was, at the date of his marriage, and at the birth of the child born at *Amsterdam* before the marriage, domiciled in the kingdom of the *Netherlands*. The child born after the marriage moved to vary the certificate by omitting the words "with the intention of permanently residing abroad." And the whole of the argument of Counsel turned upon the question whether *Leyon Goodman* was domiciled in the *Netherlands*. The question as to the testator's intentions and the construction of the will was not raised. His Honour held that the certificate of the chief clerk was right, and he ordered the fund to be equally divided between the two children born at *Amsterdam*, the one before, and the other after, the marriage, excluding the three children born in *England*. His Honour gave no reasons for his decision, at least none are reported.

The other case cited is *Boyes* v. *Bedale*, before the Vice-Chancellor *Wood*, in 1863. By the will of a domiciled Englishman who died in 1843, a sum of £5000 was bequeathed in trust for testator's nephew, *Edmund Clegg*, for life, and after his death in

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trust for his wife for her life, and after the death of the survivors, in trust to divide the principal among his children. In 1852 the nephew, who had already acquired a French domicil, formed a connection with a French lady, and had a child by her, born in 1853. He afterwards married the lady in *France*, acknowledging the daughter, and thereby legitimated her according to the law of *France*. The father being dead, the question was, whether the daughter was entitled to the £5000 subject to the mother's life interest. And the Vice-Chancellor held that she was not, on the ground that the word children in an English will must be construed to mean children lawfully begotten, unless an intention appears in the will to use the term in a different sense. I do not hesitate to follow this decision.

V.-C. K. 1865 *Nov.* 24; *Dec.* 21.

FREMAN *v.* WHITBREAD.

Apportionment—Tenant for life and remainder-man.

The Court will not, as a general rule, as between tenant for life and remainder-man, allow compensation by way of apportionment for loss of income, occasioned by the sale of stock, sold to complete a purchase under a power to invest in real estate, being delayed beyond the time fixed for completion by the contract for purchase; even although such delay may have been unavoidable.

Therefore where a tenant for life petitioned to have recouped out of *corpus* the loss of dividends sustained by her by reason of delay in completion and selling out of stock for that purpose, occasioned by difficulties arising on the title of the estate purchased, the Court refused to allow such compensation.

THIS was a Petition by Mrs. *De Witte*, asking to have made good to her out of a sum of £479 7*s.* 2*d.* uninvested capital stock, to the income of which she was entitled for life, a sum of £231 17*s.* 2*d.*, the alleged loss of income sustained by her by reason of the delay in completion of a purchase, and the selling-out for that purpose of other stock, to the dividends of which she was entitled for life, under the following circumstances:—

John Freman, the testator in the cause, by his will, dated in October, 1849, devised his real estates to the Petitioner, as tenant in tail, and gave and bequeathed his residuary personal estate to

trustees upon trust for sale and conversion, and to invest the proceeds thereof in the manner in the will expressed; and to stand possessed of the same upon trust for the Petitioner for life, for her separate use, without power of anticipation, with remainder in trust for all the Petitioner's children. The will contained a power to invest in the purchase of land by the direction or with the consent of the Petitioner after she should have attained twenty-one, and provided that any purchased land should be subject to a trust for sale in order that it might retain the character of personalty.

The Petitioner attained twenty-one in February, 1854, and in November, 1854, married Mr. *De Witte*, her present husband.

In March, 1862, a conditional contract was entered into by Mr. *De Witte* to purchase an estate in *Kent* for £34,900, the purchase to be completed on the 29th of September, 1862, the vendor to receive the rents and discharge the outgoings to that day, and from that day the purchaser to have the rents and pay the outgoings; and it was provided that, if from any cause whatever the purchase should not be completed on the 29th of September, the purchaser should pay 4 per cent. interest on the purchase-money from that date.

On the 15th of July, 1862, an order was made in the cause (with the Petitioner's consent) that this conditional contract should be carried into effect; an inquiry was directed as to title, and if title good, then that the purchase-money and expenses should be raised by a sale of a sufficient part of the stock in Court.

The stock in Court consisted of £10,000 Three per Cents. Reduced, and £10,000 New Threes, on which the dividends were payable on the 5th of April and the 10th of October; and £9790 Two-and-a-half per Cents., £5318 11*s.* 8*d.* Consols, and £5523 13*s.* 9*d.* Consols, on which the dividends were payable on the 5th of January and the 5th of July.

In consequence of difficulties arising on the title, the purchase was not completed till the 3rd of August, 1863; and on that day the whole of the above-mentioned stock, with the exception of £479 7*s.* 2*d.* Consols, was sold out: and the Petitioner sought by this Petition to have the £231 17*s.* 2*d.* paid to her out of this sum of Consols so remaining unsold.

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An arrangement had been made that the vendor of the estate purchased should remain in possession, and receive the rents up to the time of completion, instead of the purchaser paying 4 per cent., as provided by the contract.

The claim for the loss in respect of the stock on which dividends were payable in January and July, was not insisted on at the bar.

Mr. *F. Waller*, in support of the Petition:—

I admit the general proposition laid down in *Scholefield* v. *Redfern* (1), that the Court will not order an apportionment of income, as between tenant for life and remainder-man, when the period of investment falls between two dividend days; but there are special circumstances in this case which take it out of that general rule. The loss to the Petitioner was occasioned by the delay in selling out the stock, by reason of difficulties in the title to the purchased realty delaying the completion of the purchase, and over this the Petitioner had no control. The result of this delay has been that the Petitioner, between the preceding dividend day and August, 1863, has received neither the dividends on the stock, nor the rents of the purchased estate; and thus has lost the income she would have been entitled to for that period. It is true that stock does not carry interest day by day, but the proximity of the payment of the dividends raises very materially the price of stock, irrespective of accidental causes. Had the stock been sold on the 29th of September, 1862, it would have been sold *ex dividend*, and consequently at a lower price; and the tenant for life is entitled to the amount by which it has been so augmented, and if she does not receive it, part of the purchase-money for the *corpus* of the estate will be paid out of the income. The Court struggles where there are special circumstances to do justice between the parties; and in *Lord Londesborough* v. *Somerville* (2), and *Bulkeley* v. *Stevens* (3), (the latter being a case since *Scholefield* v. *Redfern* was decided) in both of which the special circumstances were not so strong as in the present case, the Court ordered an apportionment.

(1) 2 Drew & Sm. 173. (2) 19 Bea. 295.
(3) 10 L. T. (N. S.) 225.

Mr. *A. Lewis*, for the remainder-men, opposed the Petition.

Mr. *F. G. A. Williams*, for the trustees of the will.

Mr. *F. Waller*, in reply.

Dec. 21. SIR R. T. KINDERSLEY, V.C.: —

The Petitioner asks by this Petition payment out of the capital fund now in Court of a sum of £231 17*s.* 2*d.*, which is alleged to be loss of income sustained by her by reason of the delay in completion of the purchase, and in the sale of the stock.

The Petitioner does not contend that in every case and under all circumstances the tenant for life is to have the benefit of this sort of equity if it happens that the stock is sold by the trustees on some day in the interval between a given dividend day and the time when the stock would again, if sold, be sold *ex dividend*. Had such been the contention, I am of opinion that it could not have been sustained. In creating such a trust, the settlor or testator has not prescribed any particular day or time which the trustees shall select for the completion of their contract to purchase the land and for the sale of the stock; he has left that to the discretion of the trustees in the honest execution of their trust; he must have known that when the trust came to be executed the stock might have been sold either on the dividend day or within that short period immediately preceding the dividend day, during which such stock, if sold, would be sold *ex dividend*, or at any time between one dividend day and the next. If he had intended that in the latter case the tenant for life should be paid out of the *corpus* a sum of money as a compensation for the interval between the dividend day next before the sale of the stock, and the day on which the stock should be sold, he would have said so. If he has not said so, what right has the Court to add such a provision to the trusts created by the settlement or will? Whether under certain very special circumstances there may be ground for making an exception to the general rule is another question, but I am of opinion that as a general rule the tenant for life has no such right. And so I decided in *Scholefield* v. *Redfern* (1).

(1) 2 Dr. & Sm. 173.

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I proceed to consider the claim of the Petitioner founded on the circumstance that by reason of difficulties in the title the stock was not sold on the 29th of September, the day fixed for completion of the purchase, when it would have been sold *ex dividend*, but on a subsequent day.

The claim of the Petitioner assumes two or three propositions, which it may be convenient to mention in the outset.

First, it assumes that in the consideration of the present question, which is a question between tenant for life and remainderman, all fluctuations in the price of stock arising from political or commercial causes must be entirely left out of consideration. To this proposition I entirely accede.

Secondly, it assumes that if the price of stock on or shortly before a given half-yearly dividend day when the stock is sold *ex dividend* be so much per cent., that price would, during the half-year between that dividend day and the next (if you leave out of consideration political and commercial fluctuations) be continually increasing, at least until the stock would again (if sold) be sold *ex dividend;* that is, the nearer you approach the next dividend day, the higher would be the price of the stock; so that, although it is true that the dividends of stock do not accrue *de die in diem*, yet practically, with reference to the price of stock, it is the same thing as if the dividends did accrue *de die in diem*. It appears to me that this proposition, if not mathematically true, is sufficiently near the truth to be adopted.

Thirdly, the Petitioner's claim further assumes that if stock is agreed to be sold on or about a given half-yearly dividend day, and from accidental circumstances it is not sold till two or three or four months later, though still prior to the next dividend day, that delay in the sale of the stock is to the disadvantage of the tenant for life, and to the advantage of the remainder-man; inasmuch as the former gets no dividend or income for that period of delay, while the latter gains by the corresponding increase of price at which the capital stock is sold. And further, that the value of this advantage to the one and disadvantage to the other is to be measured by the amount of that proportion of the half-yearly dividend which ought to be attributed to that period of delay. This proposition also (though not quite strictly and mathematically

accurate) is sufficiently near accuracy to be adopted for the present purpose. And therefore I assume for the purposes of this case that in proportion as you increase the interval between the last preceding dividend day and the day of the sale of the stock, provided it is not carried on till the time when the stock would again (if sold) be sold *ex dividend*, you prejudice the tenant for life and benefit the remainder-man. I suppose it will not be denied that, *vice versâ*, if instead of increasing you shorten that interval, you thereby benefit the tenant for life, and prejudice the remainder-man. Founded on these propositions the claim is put upon this footing.

By way of illustration, suppose the whole of the stock had been Reduced, or New Threes, *i.e.*, stock of which the dividends are payable in April and October. If the stock had been sold on the 29th of September, 1862 (the day fixed for completion of the contract), it would have been sold *ex dividend*, and the half-year's dividend which fell due on the 10th of October following, would have been received by the trustees, and paid over by them to the Petitioner as income; but inasmuch as the stock was not sold till the 3rd of August following, the effect was this, that the Petitioner received the half-year's dividend which became due on the 5th of April, 1863, but she got no dividend for the interval between the 5th of April and the 3rd of August, *i.e.*, the interval between the dividend day next preceding the sale of the stock and the day on which the stock was sold, which was an interval of one hundred and twenty days; and at the same time the remainder-man got a benefit corresponding with the Petitioner's loss, by reason that so much less stock was sold to raise the money required than it would have been necessary to sell if sold on or just before the next preceding dividend day, when it would have been sold *ex dividend*. And this detriment to the tenant for life and benefit to the remainder-man arose from the circumstance that, from causes over which neither of them had any control, the stock had to be sold at a different time from that at which it ought to have been sold according to the contract.

Now, I entirely recognise the abstract principle upon which the claim is founded, and I admit that in the case which I have supposed there exists what may, perhaps, be fairly called a sort of equity. But it must be borne in mind that the basis of the

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equity is that the stock was not sold when it ought to have been sold according to the contract.

And it is no answer to the case of the Petitioner to say that by the terms of the contract she was to have the rents and profits of the purchased estate from the 29th of September, 1862, and that such rents and profits are a compensation to her for the loss of income during the period in question; for it was also part of the terms of the contract that interest on the purchase-money should be paid to the vendors from the 29th of September, 1862; and such interest would, of course, be payable out of the income of the tenant for life, so that the rents and profits would only be a compensation to her for the interest on the purchase-money payable out of her income, and could not be also a compensation for the loss of dividends during the period in question.

But, now, let us suppose that the whole of the stock (instead of being Reduced or New Threes) had been Consols, *i.e.*, stock of which the dividends are due on the 5th of January and the 5th of July; what would then be the effect. According to the contract the stock would have had to be sold on the 29th of September (the day fixed for completion of the contract), and if it had been then sold an interval of eighty-six days would have elapsed between the last dividend day (5th of July) and the day of sale of the stock; and the Petitioner would not have had the benefit of that portion of dividend which was attributable to that interval; but, of course, she would have had no ground for complaining of that, because it would have been in accordance with the contract. But by reason of the delay in the completion of the contract, the stock was not sold till the 3rd of August. Now, the interval between the last preceding dividend day (5th of July) and the 3rd of August, instead of being eighty-six days was only twenty-nine days, that is, fifty-seven days less than it would have been if the stock had been sold on the day fixed for completion of the contract. So that, on the supposition that the stock had been all Consols, the effect of the delay in the completion of the contract was, not to lengthen, but to shorten by fifty-seven days, the interval between the last preceding dividend day and the day of the sale of the stock; and, therefore, according to the Petitioner's own principle, the effect was to benefit the tenant for life, and to

prejudice the remainder-man by the amount of that proportion of dividend attributable to the fifty-seven days. And assuming that upon the former supposition of the stock being all Reduced or New Threes, the tenant for life would have a good equity which he might enforce against the remainder-man, it necessarily follows (if the principle is good for anything) that, upon the latter supposition of the stock being all Consols, the remainder-man would have a good equity which he might enforce against the tenant for life.

Having considered what the effect would be on each of the two suppositions that the stock was all Reduced or New Threes, or that it was all Consols, let me now consider what, upon the same principle, the effect ought to be in the actual case now before the Court; where about half the stock was Reduced or New Threes, and about half Consols or Two-and-a-half per Cents., the dividends of both the last denominations of stock being due in January and July. The effect of the delay in the completion of the contract, and of the stock not having been sold till the 3rd of August, 1863, is that as to the Reduced and New Threes the tenant for life was prejudiced and the remainder-man benefited to the extent of such a portion of the dividend on the Reduced and New Threes sold as ought to be attributable to the period of 120 days, that is, from the 5th of April to the 3rd of August; and as to the Consols and Two-and-a-half per Cents., the tenant for life was benefited, and the remainder-man prejudiced to the extent of dividends on those stocks attributable to the period of 57 days, that is, the difference between eighty-six days (being the interval between the 5th of July and 29th of September) and twenty-nine days (being the interval between the 5th of July and 3rd of August): and, therefore, upon the Petitioner's own principle, in order to ascertain the pecuniary value of her claim, the gain ought to be set off against the loss, *i.e.*, the amount by which she benefited in respect of the Consols and Two-and-a-half per Cents., ought to be deducted from the amount by which she is prejudiced in respect of the Reduced and New Threes.

I may observe in passing that the Petitioner, instead of deducting the one from the other, has added them together, and thus claims to be compensated not only for what was her loss, but also for that which was her gain.

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Now, from what I have hitherto observed, it is clear that the consequence of giving effect to the equity insisted upon by the Petitioner would be this; that in every case in which stock, settled in trust for one for life with remainder over, is to be sold, and the proceeds invested in the purchase of real estate, if the purchase is not completed on the day fixed by the contract (which occurs at least nineteen times out of twenty) there will be a Petition either by the tenant for life asking that the loss of income may be recouped out of *corpus*, or by the remainder-man asking that the loss of *corpus* may be recouped out of income; and upon every such Petition an order must be made and the costs must be borne either by the *corpus*, or by the income. This Petition which is that of the tenant for life, asks that the *corpus* may bear the costs. Assuming that to be just, if the Petition is successful, it would seem that if the Petition be that of the remainder-man, and is successful, it would be equally just that the costs should be borne by the income. It would seem singularly hard on the remainder-man if the *corpus* were in all cases to bear the costs, whether the *corpus* ought to recoup the income, or the income recoup the *corpus*. But, at all events, the costs must come out of the trust property, whether *corpus* or income; and a heavy burthen would thus be thrown on trust property in almost every case where there was a trust to lay out personalty in the purchase of realty.

But those are only a portion of the cases in which such an evil would be created by giving effect to this sort of equity. The same evil would equally ensue if the trust were of the converse kind, that is, a trust to sell real estate and invest the proceeds in the funds. In any such case, if the contract were not completed, and the money received and invested by the day appointed for that purpose, and if the effect was that the investment of the money in stock took place at a time nearer to the next dividend day than would have been the case according to the contract, the tenant for life would gain, because he would receive a dividend so much the sooner, and the remainder-man would lose, because the sale money would purchase so much less stock. And *vice versâ* if the effect of the non-completion of the contract on the day fixed was to cause the investment of the money in stock to take place at a time nearer to the next preceding dividend day than would have

been the case if the contract had been completed on the day fixed, then the tenant for life would be prejudiced by having to wait so much longer for the next dividend day, and the remainder-man would be benefited by reason that the sale-money would buy so much more stock. Now, if the principle upon which the Petitioner's claim is founded is good for anything, it must equally apply to all this numerous class of cases; and there must equally be a right in the tenant for life, or the remainder-man (as the case may be) to present a Petition in order to enforce the same sort of equity as is claimed by the present Petitioner; and thus the evil of burdening the trust property with the costs of such applications would be far more widely spread than at first sight appears. Indeed, it is obvious that the same sort of question would be constantly arising where the case was merely a change of the investment of trust property from the funds to real security, or from real security to the funds.

The result is, that if the claim made by the Petition is to prevail, there will hardly ever be a case of a trust for sale of stock and purchase of land, or even for a change of investment from the funds to real security or from real security to the funds, without its entailing an application to the Court, either by the tenant for life or by the remainder-man, to give effect to such equity. And further, if it happens that such a trust is being carried into effect by trustees out of Court, the trust property not being the subject of a suit, a bill must be filed after the trust has been executed, in order to give effect to this equity; and the trust property, either *corpus* or income, would be burdened with all the costs of a suit.

Now we know that for a century past or more—indeed, we may say from the time when the funds first came into existence—innumerable instances have occured of trusts of these several descriptions, some executed under the direction of the Court, and some by trustees out of Court. And yet, until the last ten or twelve years I believe not a single case can be found in which the Court has given effect to the sort of equity insisted upon by the petition. There have been abundance of cases in which questions as to the relative rights and equities of tenants for life and remainder-men have arisen and been decided; but I am not aware of a single case till 1854, in which a tenant for life has been held entitled to

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recover out of the *corpus* of the trust property any sum as compensation for dividend with reference to the interval of time which may happen to elapse between the last preceding dividend day, and the day of sale of the stock.

The first case in which the tenant for life was held entitled to the benefit of this sort of equity is *Lord Londesborough* v. *Somerville* (1), in 1854. But there, as I understand the report of the case, the Master of the Rolls proceeded entirely on the special circumstances of the case. The only other case that I am aware of in which this benefit was given to the tenant for life is *Bulkeley* v. *Stephens* (2), before Vice-Chancellor *Stuart;* who, if I do not misunderstand the report, treated the case as presenting an exception to the general rule; and rested his decision on the special circumstances of the case with reference to the time at which the stock was ordered to be sold with a view to the benefit of the estate; which particulars however are not stated in the report.

The question then comes to this, are the circumstances of this case of such a special and exceptional nature as to justify the Court in departing from the general rule? The only circumstance which is suggested as a specialty is, that by reason of difficulties in the title the contract was not completed on the day fixed. But how can I treat as a special and exceptional circumstance that which is common to by far the largest proportion of cases where real estate is bought or sold under trusts of the same character as in the present case. If this is a special and exceptional case, then out of every twenty such cases, probably nineteen would have to be treated as exceptional and special cases. And if this is a special and exceptional case, several hundreds of cases equally special and exceptional have occured during the last century, in none of which has any such equity been administered. To grant the prayer of this petition would be to open the gates to a flood of applications of a similar kind, entailing upon trust properties a heavy burthen of expense from which they have hitherto been exempt. And I cannot consent to introduce a practice which would be, in my opinion, fraught with such evil consequences. There will, therefore, be no order on the Petition.

(1) 19 Beav. 295. (2) 3 N. R. 105. 10 LTR S 225

In re LONDON AND MERCANTILE DISCOUNT COMPANY.

V.-C. W.
1865
Dec. 9, 18.

Voluntary Winding-up—Companies' Act, 1862—(25 & 26 *Vict.* c. 89.) § 138, 147, 148.

The Court will not at the instance of contributories interfere with a voluntary winding-up by ordering a winding-up by or under the supervision of the Court, except where the resolution for winding-up voluntarily has been obtained by fraud, or by an inequitable overbearing of the rights of a dissentient minority by improper influence.

THIS was a Petition that a company which was in process of voluntary liquidation should be wound up by the Court, or under the supervision of the Court; and that in this latter case a liquidator should be appointed by the Court, to act in the winding-up with the liquidators appointed by the company, and to take proceedings singly, in the name of the company, in respect of certain fraudulent or improper transactions alleged in the Petition to have been perpetrated by some of the directors and other persons with their connivance.

The Petition was filed by several shareholders in the company, and its principal object was that proceedings might be directed to be taken, at the risk of the company, in respect of the improper doings above referred to.

Much evidence was gone into to shew that the proceedings objected to were fraudulent and illegal, and that the company, which was entirely insolvent, would in all probability recover a considerable amount, out of which it had been defrauded, if proceedings were instituted and *bonâ fide* prosecuted.

1. It was charged that moneys had been improperly paid by the directors for one Mr. *Kintrae*, for preliminary expenses which he had contracted to be himself liable for.

2. That two of the directors, Messrs. *Womersley* and *Burt*, had paid themselves, out of the assets of the company, salaries to which they were not entitled by any rule or resolution of the

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company; and that the same directors had fraudulently, with the connivance, or by the neglect of the other directors, sold to the company, at an absurdly high price, a business carried on by them theretofore, of the same nature as that carried on by the company.

3. That a large sum had been paid by the directors to a person named *Jay* for procuring the sale of the said business, which in reality was received by *Kintrae*, *Jay* having been put forward by him as the agent for the sale in question, which was in reality made through *Kintrae*, *Jay* knowing nothing about the parties.

4. That a large number of shares, which stood in the names of Messrs. *Burt* and *Womersley*, upon which £40 per share remained unpaid, had been cancelled without authority.

5. That a large number of other shares, held by friends of the directors, had been forfeited, when it was clear that forfeiture would only be for the benefit of the shareholder, and not of the company.

The case set up by the Petitioners was as follows:—

The company had been originally got up by Mr. *Kintrae*, and he, as projector of the company, by articles of agreement, dated the 2nd of January, 1864, contracted with Mr. *Whiffin*, duly authorized on behalf of the directors of an existing company of the same kind, called the *British Reversionary and Investment Company, Limited*, of which company *Whiffin* was secretary, for the purchase of the business of the last-named company by the projected company.

The projected company was to pay for this purchase £9000, and to assume the liabilities of the existing company, and out of the sum of £9000 so to be paid, *Kintrae* was to receive from the existing company £5000. *Kintrae* was to pay all preliminary expenses in getting up the proposed company, and certain provisions were made for not making any allotment of the shares of the new company unless a certain proportion of shares should be subscribed for and taken up.

The articles of association of the new company, when registered, provided that the directors should, within one month from allotment, pay the whole expenses up to the date of allotment, and should adopt and carry into effect any contract already made on

behalf of the company for the purchase of the business of the *British Reversionary and Investment Company, Limited.*

All the subscribers of the memorandum of association were nominees of *Kintrae,* and transferred their shares to him as soon as the concern was started.

By articles of agreement, dated the 8th of January, 1864, between the new company, viz., *The London and Mercantile Discount Company, Limited,* of the one part, and Mr. *Kintrae* of the other, which recited the agreement of the 2nd of January, omitting, however, the agreement that £5000 should be paid to *Kintrae,* and inserting in the provision for the payment by him of the preliminary expenses, a condition not contained in the original instrument, that such payment was only to be made by him if no allotment were made, proceeded to carry out the former agreement in other respects, by formal agreement, on the part of the company, to take over the business, to pay the £9000, &c., and on the part of *Kintrae,* to secure the goodwill, &c., to the new company.

Directors were afterwards elected, and the common seal of the company was set to the last-mentioned agreement.

The shares were not being subscribed for at the rate expected, when proposals were made for the purchase of another business, carried on by Messrs. *Womersley & Burt,* for promoting which one *Jay* was to receive £2000. While negotiations for this purchase were pending, prospectuses were issued stating that it was completed, and naming Messrs. *Womersley* and *Burt* as managing directors.

Negotiations were concluded without any investigation into the value of the business, and without inspecting the books; and it was agreed that the purchase-money should be £13,000 in cash and £13,000 in shares, to be reduced to £10,000 in cash and £10,000 in shares, if the net profits were below certain amounts, to which they never amounted; and *Womersley* and *Burt* were elected directors.

The first issue of 5000 shares was taken up, the £9000 paid to the old company, of which *Kintrae* received £5000, £2000 were paid (or allowed in account) to *Jay,* £13,000 in cash to *Burt* and *Womersley,* and £13,000 in shares allotted to them, and shortly

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after a bill for more than £700 for preliminary expenses was paid by the directors, *Kintrae* having refused to pay it.

A deed was executed by the company, on the purchase of *Burt* and *Womersley's* business, by which the company agreed to pay £750 per annum to each of them for their services as managing directors, salaries which the company was not authorized by its articles, or any resolution, to grant.

The other acts above-mentioned were also charged in the Petition.

The assets of the company being by these payments and misfeasances reduced to a very few thousand pounds, it was clear that its business could not be carried on; and in August, 1865, *Whiffin* and three directors, and some other shareholders, presented a Petition before the Master of the Rolls for winding-up the company, on the ground of its complete insolvency.

While this Petition was pending, a special resolution for winding-up voluntarily was passed at a meeting held on the 19th of September, and was confirmed by a meeting held on the 18th of October, 1865.

At the latter meeting, *Whiffin* and *Stone* were proposed as liquidators, but at the instance of some dissentient shareholders, and among them the present Petitioners, who desired also to take advice as to the rights of the company, the meeting was adjourned to the 27th, for the election of liquidators.

The present Petitioners obtained counsel's opinion in favour of taking proceedings, and at the adjourned meeting they read the opinion, and opposed the election of *Whiffin* on the ground that (as the fact was) he had already expressed his determination not to act on such opinion, and that he was too much mixed up in several of the transactions complained of; and also the election of *Stone*, who had been one of the auditors, and as such had passed the items objected to without bringing the same to the notice of the company: they proposed as liquidator Mr. *Cooper*, a professional accountant. The directors supported *Whiffin* and *Stone*, and openly stated that if they were elected no proceedings would be taken in respect of the matters complained of. A poll was demanded, and *Whiffin* and *Stone* were elected. The majority included the votes of *Whiffin* and *Stone* themselves, those of

Womersley and *Burt*, and the directors generally, and proxies held by them.

On the 7th November, 1865, the Petition before the Master of the Rolls came on for hearing, and was dismissed by consent of the Petitioners named in it.

The present Petition was thereupon presented.

At the meeting of the 19th September, a committee of investigation into the affairs of the company had been appointed, one of the members of which was *Whiffin*. They reported on the 17th of October, and their report was shortly after circulated among the shareholders, and was, as to the principal facts, very much to the effect of the foregoing statement.

Mr. *Rolt*, Q.C., and Mr. *Westlake*, for the Petitioners, read and commented on the evidence, and contended that the liquidators elected were partisans, and not proper persons to have uncontrolled conduct of the winding-up; that if the votes and proxies of the directors, of the liquidators themselves, and the shareholders in the *British Reversionary Investment Company* were excluded, there would be a majority in favour of Mr. *Cooper*, and that the votes of the members of *Womersley's* family should also be excluded, which would increase that majority.

Mr. Daniel, Q.C., and *Mr. Higgins*, for the respondents, also commented on the evidence, and submitted that the Court had on a Petition by contributories after a resolution for voluntary winding-up, no jurisdiction to order winding up absolutely by the Court; *In re Gibraltar and Malta Bank* (1); that as to a supervision order, if the Court allowed the prayer of the Petition, it would virtually take away from the company the right given it by statute to wind up voluntarily, and force on the company the expense of a precarious litigation, which a majority had by resolution virtually declared they objected to.

The VICE-CHANCELLOR suggested that the case had better stand over to give an opportunity of calling a meeting to take the sense of the company specifically on the question of further litigation.

The case accordingly stood over till the 18th of December,

(1) Law Rep. 1 Ch. 69.

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when it again came on; no meeting had been held in the interim, the Petitioners deeming that there was no chance of obtaining a resolution in their favour.

Mr. *Rolt*, Q.C., and Mr. *Westlake*, were again heard.

SIR W. PAGE WOOD, V.C.:—

It appears to me that this is a case in which I ought not to make the order prayed, especially as the Petitioners have refused the alternative offered of submitting the question again to a meeting called for the purpose. The Court can hardly be too careful in adhering to the course which seems to have been thought desirable by the Legislature, when it gave power to companies to wind up voluntarily. The Legislature has thought that the shareholders should meet and regulate that part of their own business as they would regulate any other part of it by the views of the majority; and provided the votes of the majority are given fairly and reasonably, there is no ground whatever for the interference of the Court. At the same time, no doubt, it was foreseen that there might arise cases of such decided undue influence, and such a course of overbearing authority by those whose acts were sought to be impeached, as would render it desirable that the Court should interfere; and therefore, in such cases, there was reserved to the Court the power of superintending a voluntary winding-up by putting in force its coercive jurisdiction, where anything improper should be attempted on the part of those, who might endeavour to screen their own actions by procuring a voluntary winding-up. It is only by bringing the case as near as possible to the latter alternative, that the Petitioners could be entitled to entertain any hope of success in the attempt to obtain the order sought. [His Honour stated the principal charges raised by the Petition, and continued:—] These are the charges which have been made; I pronounce no opinion at present about the charges with reference to Mr. *Kintrae* or as regards Mr. *Jay;* those are matters which the company, if they think fit to investigate them, are as competent to investigate as I am. It will probably answer every present purpose, if I say that, if there be nothing further in the case, I should think there may be some ground for saying

that the dealings of *Kintrae* and *Jay* might be proper subjects of further investigation. With regard to the discount business of Messrs. *Burt* and *Wormersley*, on the other hand, if I were now sitting in Chambers considering whether it were desirable or not that proceedings should be taken to set aside that transaction, or to make the directors responsible for it, I should say it would be a most hazardous litigation, so far as the evidence before me goes; for whether the books were inspected or not, it is clear on the evidence that these gentlemen had a very large and profitable business which they handed over to the company, and the company after being dissatisfied with the arrangement, has accepted back both shares and money from them; and I should say it is a very doubtful point, as the matter stands, whether a litigation on this transaction could be successful.

Then, the next question is, who are the proper judges whether litigation should be attempted or not? Now Parliament clearly intended that in general the company should be the judges of that as of every other part of the company's business, supposing the company be put in the position to judge, and therefore before I make any order upon a Petition of this character, taking from the company those powers which it was intended that the shareholders, like other reasonable persons who are *sui juris*, should exercise or not at their own discretion, I must be satisfied that it is, or must be intended to be, the wish of the majority. I have diligently sought to ascertain therefore whether in truth this minority, or apparent minority of shareholders, have been overborne by improper or corrupt influence; if such a case were proved, no doubt the Court would interfere; that is one of the very objects which the Legislature had in view, when it declared that notwithstanding a voluntary winding-up there should be a power of interference; but I cannot find any trace of that. All that is alleged is, that if you deduct the directors' votes, the votes of those gentlemen who were connected with the former discount company, all Mr. *Whiffin's* votes and Mr. *Stone's* votes, and the votes held in proxy by those gentlemen, you will get a majority in favour of the views of the Petitioners, but it is on the other hand conceded that if you do not deduct the proxies held by those persons, there is a majority of the company still adverse to the prayer of the Petition.

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Now I want to know what good reason is there for making such deductions, as to the principals it might be, perhaps, reasonably urged that the votes of the directors whose acts are impeached should be ignored, and it might also be reasonable to say that Messrs. *Burt's* and *Wormersley's* votes should be excluded, the dealing with them being one of the matters to be investigated; but when you come to Mr. *Whiffin* and Mr. *Stone,* I can see no reason for refusing to consider their votes, merely because they have been elected liquidators; they have been so elected by the majority of the company, and they ought to have, like other shareholders, a voice in deciding whether litigation be or be not desirable; there is no charge made out against either of them. Mr. *Whiffin* was a member of the committee of investigation who reported, in some respects, very adversely to the directors. The reason I am asked to supplant them, or appoint any one to act with them who will take a view adverse to theirs on the advisability of litigation, is that it was put to the meeting that those who were adverse to litigation should vote for them, and that they are therefore pledged; but though that was a rough way of testing the sense of the meeting on the subject of the litigation, it was open to those who favoured the view of the Petitioners to have supported that view by opposing the election of these gentlemen; and they having been elected, I can see no impropriety in their openly stating that they think litigation unadvisable, or in their voting in that view and accepting office to carry it out.

It seems to me that one of the objects of the Act of Parliament is to prevent persons being embarked in the litigation which takes place commonly in winding-up companies by compulsion, and that what the Court ought to consider on such a question is what is the will of the company; and if satisfied on that head, qualified as I have stated by the consideration as to whether or not there has been an overbearing majority got together or influenced fraudulently by those whose acts are impeached, then the will of the company seems to me to be the one thing pointed out by the Legislature to guide and direct this Court in its interference. It is not because by the 149th section it is enacted that the Court may interfere, that therefore it must interfere. [His Honour read the section, and emphasised the words "having regard, &c."] Why then

should I disregard Mr. *Whiffin's* or Mr. *Stone's* votes; and still more, why their proxies? If persons give their proxies it is clear they must be supposed they trust to or coincide in opinion with the persons to whom they give them. I must assume the persons who give their proxies to be *sui juris*, and to know what they are about; and that being so, why are they to be disregarded because they happen to differ in opinion from the Petitioners? The reason why I suggested another meeting was this; it occurred to me that the report of *Whiffin* and the other members of the committee of investigation may have been produced at the meeting on the 18th of October, and may not have been previously known to some of the shareholders; that it may well have been unknown to absent shareholders at the time they gave their proxies, and that in any case those shareholders must have been ignorant of what took place at that meeting, which might have changed their opinions; and I thought an opportunity should be afforded to set the matter more fully before such persons and, if necessary, take their sense again upon the fuller information. The Petitioners, however, say frankly that that is of no use, and that the result of a new meeting would be identical with that of the last; and that being so, on what pretence can I ignore the votes of the proxies?

In this state of things, I find the case reduced to this: there is a majority of the company adverse to litigation. I cannot say even that they are unwise, for they may know better than I do what the result of litigation, even if apparently successful, may be; as, for instance, what may be the solvency of the persons against whom they might recover. It would come to this: that if I were to make the order sought, I should be depriving the company of all benefit intended for them by the Legislature, when it bestowed on companies the power of voluntary winding-up, and I should be continually having cases of persons dissatisfied with some part of the conduct of a voluntary winding-up, presenting Petitions to have their views carried out instead of those of the majority; I should have all the questions raised on this Petition again contested at Chambers at great expense, and I should ultimately be forcing on a litigation at vast expense to the company against the wishes of a majority; whereas, by abstaining from interference, I

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throw no obstacle in the way of the Petitioners prosecuting any litigation they may think right at their own risk; I only throw on them the risk of such litigation; they may file their bill, and my refusal to make an order on this Petition will in no way prevent their doing so.

As to the case against the directors, that may probably be met even without bill, by the 138th section; as to the case against persons outside the company, a bill will probably be necessary, and this may be so, also, as to the case of the discount brokers for matters not charged against them *quâ* directors, which, perhaps, may not be met by the 138th section, but any litigation must be, if unsuccessful, at the risk of the Petitioners.

Petition dismissed without prejudice to the Petitioners filing a a bill.

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In re RAWLINS' ESTATE.

Leases and Sales of Settled Estates Acts (19 & 20 *Vict. c.* 120, ss. 2, 5; 21 & 22 *Vict. c.* 77, *s.* 5.)—*Surrender—Best Rent.*

Section 2 of the *Leases and Sales of Settled Estates Act*, requiring the best rent to be reserved, is modified by section 5 of the same Act extended by section 5 of the amended Act, which allow the Court to permit the surrender of existing leases and the grant of new leases of the property surrendered.

The best rent means the best that under all the circumstances can reasonably be had, taking into account the value of the lease surrendered.

THIS was a Petition under the *Leases and Sales Act*, and also under Lord *St. Leonards* Act (22 & 23 Vic. c. 35, s. 30) for the advice and direction of the Court. The advice of the Court was asked whether the Petitioners, as trustees of a will, ought to make or concur in an application to the Inclosure Commissioners for an exchange of some of the settled property for other property adjoining it, so as to rectify the boundaries of both properties; and the sanction of the Court was sought under the *Leases and Sales Acts* to the proposed surrender of a lease subsisting in the settled property, and the grant of a new lease thereof, on terms which were set out in the Petition.

It appeared that the rent proposed was adequate, taking

into consideration the value surrendered, of the subsisting lease; but that if the property were treated as actually in possession, a better rent might be obtained.

Mr. *Bovill*, on the part of the Petitioners, referred to the 2nd section and the 5th section of the *Leases and Sales Act* (19 & 20 Vic. c. 120), and to the 5th section of the Amendment Act (21 & 22 Vic. c. 77. s. 5), and noticed a doubt which had been suggested (1), whether the best rent must not be reserved, independent of the supposed value of the surrender, since if value was allowed for the surrender, it might be held to be in the nature of a fine or foregift, and vitiate the lease.

Mr. *Rolt*, Q.C., Mr. *James*, Q.C., Mr. *Giffard*, Q.C., and Mr. *Bagshawe*, appeared for different respondents, and submitted the question to the Court.

SIR W. PAGE WOOD, V.C.:—

As to the surrender, I do not think the Act compels me so to require the best rent, that the surrender must be made for nothing. To give it such a construction must practically be to refuse the exercise of the power deliberately conferred by the Legislature, since no one could be expected to consent to the surrender of a subsisting lease, which might be valuable, without receiving any consideration for such surrender. The Court in sanctioning a lease under these Acts must look to all the circumstances, and see that on the whole the best terms are made for the benefit of the persons interested under the settlement, which can reasonably be had, whether by means of obtaining a surrender or otherwise. It might well be that without a surrender it might not be possible to obtain so good a rent on the whole. I think, therefore, the Court may take into consideration the value of the lease surrendered in determining the question of the amount of rent to be required.

(1) This doubt is suggested in Mr. *Davidson's* Conveyancing, 3rd ed., vol. iii. p. 430.

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In re GREEN'S SETTLEMENT.

Presumption—Survivorship—Onus probandi—Next of Kin.

Persons claiming property as next of kin to a deceased intestate, and shewing their kindred, are entitled, in the absence of evidence that a person now dead and nearer of kin to the intestate survived him. The onus rests on those claiming through a deceased nearer of kin to the intestate, to shew that such deceased survived the intestate.

THIS was a Petition by the mother, brothers, and sisters, of *Amante Green*, deceased, as her next of kin, for the payment to them of moneys paid into Court by the trustees of her marriage settlement. The trusts of the settlement were the ordinary trusts for the wife for her life, with remainder to the husband for his life, with remainder to the children, in default of appointment, who should attain twenty-one, or marry, with remainder in default of children, who should attain vested interests, to the wife absolutely if she survived her husband.

There was one child of the marriage, who was, at the time when the events next stated happened, an infant of about eight months old.

On the 3rd of June, 1857, Mr. and Mrs. *Green*, with their infant child, were in *India* when the mutiny broke out there. Mr. *Green* was immediately murdered; on the same day Mrs. *Green* escaped into the bush and was afterwards heard of, and a letter from her written while in the bush was produced. She, however, was on the 16th of November following, captured by the mutineers and murdered. The native nurse and child had also on the 3rd of June escaped from the house in which Mr. and Mrs. *Green* resided, but by a different way from that by which Mrs. *Green* had escaped, and had never since been distinctly heard of. There was evidence that a lady known to Mrs. *Green* had heard a native woman whom she believed to be the nurse, but could not positively identify as such, state that the child had been on the 7th of June taken by the mutineers, and that she could not tell what they had done with it. In this condition of the evidence, seven years having more than elapsed since any tidings of the child had been received, the

Petition was presented. It was opposed on the part of Mr. *Green's* brothers and sisters, or such of them as were alive, and the representatives of some of them who were dead. One of the respondents had taken out administration to the infant child.

Mr. *Dickinson*, on the part of the Petitioners, argued that it was shewn that his clients were next of kin to Mrs. *Green*, unless the child outlived her, and the respondents, who objected to his title, must shew a better; *Underwood* v. *Wing* (1). They claimed through the infant child of Mr. and Mrs. *Green*, and it was incumbent on them to shew that the person through whom they claimed was himself entitled, which they had not done; they must for such a purpose prove that the child survived its mother, and all the evidence there was, tended the other way. There was no presumption of law when the child died, though there was a presumption that it was now dead; *Nepean* v. *Doe* (2).

Mr. *Druce*, for the trustees, took no part in the argument.

Mr. *G. N. Colt*, for the living brothers and sisters of Mr. *Green* and representatives of deceased brothers and sisters, contended that the onus of proving that the Petitioners were next of kin to Mrs. *Green* at the time of her death lay on the Petitioners solely, and that to do that they must shew that the child, whose existence was proved shortly before the mother's death, had died in the mother's life. This there was not a tittle of evidence to shew.

SIR W. PAGE WOOD, V.C.:—

I think the rule which the Court should follow in this case is analogous to that laid down in *Underwood* v. *Wing*. The whole question is on whom is the onus of proof thrown. The lady on the devolution of whose estate the question arises is shewn to have died on the 16th of November; her husband is shewn to have died before her; a number of persons claim as her relatives, and prove their kindred within a certain degree; and, so far as now appears, there is no one nearer in kindred. On the other hand the representative of another person claims the property also, and shews that the person through whom he claims was nearer of kin than the

(1) 4 D. M. & G. 633. (2) 2 M. & W. 894, 913; 2 Sm. L.C. 476.

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Petitioners, and would have been entitled, if he survived his mother; but a person claiming under such a title must go further and must shew not only that the person through whom he claims would have been entitled if he survived, but that he actually was entitled, or, in other words, that he did survive. I am of opinion also that in this case there was some evidence to go to a jury that the child died in the mother's life; the letter of Mrs. *Green* shews that at the time it was written the child, an infant in arms, was separated from its father and mother, and was in the hands of a native female nurse in a time and place when and where it was most improbable that it should escape destruction. But I do not rest my decision on this evidence, I prefer to rely on the grounds which I have before stated.

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In Re WYNDHAM'S TRUSTS.

Will—"Personal Representative"—"Issue"—After-acquired Property.

Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment, equally. And on the death of such of the said daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative:—

Held, that "issue" meant issue who would be entitled under the former gift, *i. e.*, children. "Personal representative" meant executor or administrator.

The husband of one of the daughters, after the death of the testatrix, by postnuptial deed covenanted with a trustee that all the real and personal property which might thereafter at any time during the joint lives of himself and his wife devolve on her, should be held and disposed of by her as her separate property, notwithstanding coverture:—

Held, that the before-mentioned property, on the wife's death without children, was not subject to the covenant, and did not pass by her will, but went to her husband as general administrator. *Grafftey* v. *Humpage* (1), distinguished.

LÆTITIA WYNDHAM, by her will, dated the 6th of January, 1832, appointed a sum of £36,000, out of property over which she had a power of appointment, to trustees, upon trust for her six daughters, *Lætitia Codrington*, *Mary Ann Biggs*, *Louisa Elizabeth Knatchbull*, *Ella Wyndham*, *Charlotte Wyndham*,

(1) 1 Beav. 46.

and *Henrietta Sophia Patient*, for their separate use respectively for life, and after the death of each in trust, as to her share to pay the principal thereof to or for the use of the child or children of such daughter in such manner as she should by deed or will appoint; and in default of such appointment, to her child or children, if more than one, in equal shares absolutely. "And *on the death* of such of her said daughters after attaining the age of twenty-one years, as should die without issue, her share *to be paid to her personal representative*;" but if any of her daughters should die under age without having been married, then she gave and appointed the shares of all such as should die, as well accruing as original shares, to the survivors or survivor of the said daughters, in like manner as she had thereinbefore given them their shares of the said £36,000. And she gave all the residue of the property subject to the power, to and amongst her five younger sons and her said six daughters, equally, share and share alike.

She died on the 7th of December, 1837, leaving six sons and the six daughters above named.

The question for decision arose as to the share of *Henrietta Sophia Patient*, who died on the 1st of September, 1862, without ever having had issue, but having attained the age of twenty-one. Her share had been paid into Court under the following circumstances.

By an indenture, dated the 30th of December, 1854, made between *Ambrose Patient*, the husband of *Henrietta Sophia Patient*, of the one part, and *William Wyndham* her father, and herself, of the other part, *Ambrose Patient* covenanted with *William Wyndham* that all the clothes, jewels, and other effects which belonged to Mrs. *Patient* before her marriage or which were at the date of the indenture now in statement, used by her, or reputed to belong to her, and all other real and personal estate and effects which should or might at any time thereafter during the joint lives of her said husband and herself descend, devolve upon, or be given, devised or bequeathed to, or in trust for her, should and might be absolutely held and enjoyed and be disposed of by her for her sole and separate use, as she, notwithstanding her coverture, should think fit.

Mrs. *Patient* made her will, dated the 14th of October, 1861, and

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thereby after appointing other moneys, over which she had power, and reciting the above indenture, gave all the residue of her estate, over which she had any control or disposing power, to her brother, *Charles Henry Wyndham*, whom she appointed executor.

Probate of the will was granted to the said *Charles Henry Wyndham*, limited to the property subject to Mrs. *Patient's* several powers of appointment and appointed by her accordingly.

Administration *cæterorum* was granted to *Ambrose Patient*.

On the 5th of March, 1865, Mrs. *Patient's* share in the £36,000 appointed by the will of *Lætitia Wyndham*, was paid into Court under the *Trustees' Relief Act*.

A Petition was presented by *Ambrose Patient*, and some incumbrancers claiming under him, praying for payment of the fund in Court to the Petitioners.

The prayer of the Petition was contested by the executor of Mrs. *Patient* under the limited probate.

Mr. *Rolt*, Q.C., and Mr. *Wickens*, for the Petitioner:—

The gift to the "personal representative" was not too remote, for in the preceding words "on the death of such of my daughters after attaining the age of twenty-one years as shall die without issue," the word "issue" must be limited by the preceding gift, to issue who would be entitled to take under that gift. *Prior* on Issue (p. 180), *Pride* v. *Fooks*, *per Turner*, L.J. (1), *Hedges* v. *Harpur* (2), *Re Crawford's Trust*, *per Kindersley*, V.C. (3), *Chapman* v. *Chapman* (4), *Dixon* v. *Dixon* (5).

The words "personal representative" must be taken in their usual and proper sense. The cases in which a different construction has been given were all cases in which there was an incompatibility in the form of the gift with the character of representation, as, for instance, where words of severance, such as "personal representatives share and share alike," or the like, were introduced; *Palin* v. *Hills* (6), *King* v. *Cleaveland* (7).

Mr. *Charles Hall*, for the trustees of the will.

(1) 3 De. G. & J. 280.
(2) 3 De. G. & J. 129.
(3) 2 Drew. 234.
(4) 33 Beav. 556.
(5) 24 Beav. 129.
(6) 1 M. & K. 470.
(7) 4 De. G. & J. 477.

Mr. *Freeling*, for some of the residuary legatees and of the next of kin, did not oppose.

Mr. *E. R. Turner*, for others of the next of kin and residuary legatees and also for *Charles Henry Wyndham*, the executor under the limited probate of Mrs. *Patient's* will, submitted the case of the next of kin and residuary legatees to the Court, and in favour of the next of kin cited *Robinson* v. *Smith* (1); and he referred also to *Smith* v. *Barneby* (2), and *Re Hughes* (3). He contended that "personal representative" meant the limited executor: *Grafftey* v. *Humpage* (4). The only words which seemed to contradict this contention were the words in the deed of the 30th of December, 1854, limiting the property which was thereby settled to Mrs. *Patient's* separate use, to real and personal property, which might thereafter during the joint lives of Mr. and Mrs. *Patient* descend, devolve upon, or be given, &c., to her. In the case of *Grafftey* v. *Humpage*, the words were very similar, and it was there held, that the right, which did not ripen till the death of the wife, accrued by the coverture.

SIR W. PAGE WOOD, V.C.:—

Two of the points raised in this case seem to me concluded by authority. In the first place, where there is a devise to children of the first taker, and then a gift over on the death of such first taker, "without issue," the word issue is confined to issue who could take under the former limitation, and the reason of this rule is well expressed by the Lord Justice *Turner* in the case cited of *Pride* v. *Fooks*. It seems also well settled that the words "personal representative" must, in the absence of other controlling words, which do not appear in this case, be taken to mean person claiming as executor or administrator. Some difficulty, however, arises in this case, as between the executor of Mrs. *Patient*, under her testamentary appointment, and the Petitioner, Mr. *Patient*, as her general administrator.

The case of *Grafftey* v. *Humpage*, relied on by Mr. *Turner* in support of the claim of the executor, is, however, distinguishable

(1) 6 Sim. 47.
(2) 2 Coll. 728.
(3) 4 Giff. 432.
(4) 1 Beav. 46.

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in what seem to me material points from the present case; it was a case of ante-nuptial settlement, and the apparent intention of the settlement was to give all future property which should accrue to the wife, or in her right, to her disposal; and Lord *Langdale*, admitting the difficulty thrown in his way by the words in that case, which were, "in case the intended wife, or the husband in her right, should at any time or times thereafter, during the said coverture, succeed to the possession of, or acquire any property," thought the effect of those words might be obviated by the construction which he suggested, that the inchoate right vested in the husband by the coverture, continued during the coverture, and was only completed by the death of the wife into a possessory right, which must have relation to the inchoate right. In the present case this principle is inapplicable, for the deed of December, 1854, refers only to property which should thereafter devolve on the wife during the joint lives of the husband and wife; it could not have been intended to refer to any property in right of the wife, which had already devolved; for if so, such property might have been already spent by the husband. All the interest which the husband obtained in the present case accrued after the determination of the joint lives, if we exclude the inchoate right to take administration, which had accrued before the date of the deed of 1854, and which, therefore, could not have been intended to pass by that deed. The power to devise, given to Mrs. *Patient* by that deed, was limited to property acquired after the date of the deed and during the joint lives. This is not property which can fall under that designation, and is therefore excluded from the power. The Petitioner is therefore, on the true construction of the will of Mrs. *Wyndham*, entitled, as the personal representative of Mrs. *Patient*, to the trust fund in Court.

In re HUNTER'S TRUSTS.

V.-C. W.
1865
Nov. 18.

Will—Vesting—Survivors—Period of Distribution—Share by representation.

Testator directed his trustees to apply the rents of a certain real estate towards the maintenance and education of his daughters (naming seven), until his youngest daughter should attain twenty-one. He then directed the property to be sold and the proceeds to be divided equally amongst his daughters, share and share alike; "but if any of his said daughters should die before his youngest daughter arrived at twenty-one years, her or their share or shares to be divided amongst his surviving daughters, share and share alike; but if any of his said daughters should marry and die before the said youngest daughter attained twenty-one and leave a child or children, it or they should receive their mother's share equally among them":—

Held, that there were no vested interests until the youngest daughter attained twenty-one.

Held further, that by the words "mother's share" was meant the share which the mother would have taken had she survived the period of distribution.

ANTHONY HUNTER, by his will, dated the 11th of April, 1833, after making a contingent bequest to his daughters, *Anne*, *Elizabeth*, *Margaret*, *Mary*, *Isabella*, *Alice*, and *Sarah*, gave and bequeathed the remainder of his personal estate, after payment of debts, &c., to two trustees upon certain trusts. He then devised two estates in the parish of *Ravenstonedale*, in trust, for the use and purpose thereinafter mentioned. He directed his trustees to receive the rents and profits of the said estates every year until his youngest daughter should attain the age of twenty-one years, *to be applied towards* the maintenance and education of his said daughters until his youngest daughter should attain the age of twenty-one years. He then ordered and directed that his trustees should sell the two estates, and that the moneys arising from said sale or sales, after paying all necessary expenses, should be equally divided amongst his daughters share and share alike; "*and if any of his said daughters should die before* his youngest daughter arrived at twenty-one years, *her or their share or shares* to be divided amongst his *surviving daughters*, share and share alike; but if any of his said daughters should marry and die before the said youngest daughter attained the age of twenty-one, and leave a

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child or children, he ordered that it or they should receive *their mother's share* equally among them."

The testator died shortly after the date of the will, leaving his said seven daughters surviving. *Sarah Hunter*, the youngest daughter, attained twenty-one on the 5th of December, 1848. In the meantime four of the daughters had died.

Anne married *Henry Eglin*, and died on the 2nd of October, 1839, without having any issue.

Elizabeth died on the 25th of October, 1836, a spinster.

Isabella died on the 20th of March, 1846, also a spinster.

Margaret married *Thomas Dent*, and died on the 11th of February, 1844, leaving one child, *Stephen Dent*, surviving her.

Of the two remaining daughters who survived the period of distribution, *Alice* married *Anthony Dawson*, and was now a widow; and *Mary*, in the year 1851, married *John Knewstubb*, upon which occasion her fourth was put into settlement.

Sarah Hunter, the youngest daughter, in 1852, married *James Knewstubb*, and her share also was settled.

Stephen Dent attained twenty-one, and died in May, 1863, leaving his father, *Thomas Dent*, his only next of kin.

The Petitioners were the trustees of the marriage settlements of *Mary* and *Sarah Knewstubb;* and the contest that arose was between them and the representatives of the three daughters who had died without issue before the period of distribution.

The first question was, whether the survivors, from time to time, of daughters dying without issue before the period of distribution, took vested interests in the shares accruing to them by such deaths respectively; or whether nothing vested until the youngest daughter attained twenty-one?

The second question was, what was meant by the words "their mother's share?"

Mr. *Dickinson*, for the Petitioners:—

The only gift of the *corpus* of the estate was to be found in the direction of what was to be done with the proceeds of the sale, and this was not to take place till the youngest daughter should attain twenty-one. Hence there was nothing to shew that any daughter was to take anything before the youngest attained twenty-one.

Upon the words of the will simply, the subject which was most present to the mind of the testator as to the period of survivorship, was the coming of age of his youngest daughter. If it were held that all the accrued shares vested before the period of distribution, the absurdity would follow that whilst the representatives of the first daughter who died would take nothing, those of the second would take a small fraction, those of the third a large fraction, and so on; whereas there was no reason to believe the testator intended there should be any inequality between them. Moreover, the final division would have to be in 210ths, instead of in sevenths, which was inconvenient.

Prior to the decision in *Cripps* v. *Wolcott*, (1) the law was in favour of vesting before the period of distribution; but that case altered the current of the decisions. It had been followed by *Vorley* v. *Richardson* (2).

As to the share of *Stephen Dent*, it could not have been the intention of the testator that he should take nothing. The words "mother's share" must be held to mean the share originally given to the mother, namely, one-seventh.

Mr. *North*, for the representatives of the infant son.

Mr. *J. W. Chitty*, appearing for the trustees, the Vice-Chancellor appointed him to represent the estates of the three daughters who had died without issue before the 5th of December, 1848, and who had no legal personal representatives.

He accordingly submitted that the survivorship was intended by the testator to be a survivorship amongst all his daughters *inter se*; *White* v. *Baker* (3). The words "if any of my said daughters shall die before my youngest daughter arrives at twenty-one" had reference not to death generally, but to death in the testator's lifetime.

SIR W. PAGE WOOD, V.C.:—

I think the testator's meaning is sufficiently apparent, because the scheme of his will is this. He does not intend that any division shall take place before his youngest daughter attains

(1) 4 Madd. 15. (2) 8 De G. M. & G. 126. (3) 2 D. F. & J. 55.

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twenty-one. Notwithstanding the principle laid down by Sir *W. Grant*, in the case of *Hanson* v. *Graham* (4), there can be no vested interest in this case, because the income is given as a common fund towards maintenance and education; and he postpones altogether any division of the property until his youngest daughter attains twenty-one.

[His Honour read the provisions of the will.]

I think the clear meaning of the words "surviving daughters," is, that if any daughters are found *in esse* at the time when the distribution is to take place, then the share or shares of one daughter, or of two or more daughters who may have died without leaving issue, all are to go over among the surviving daughters.

Then the testator proceeds to provide for the case of any of his daughters marrying and dying leaving issue before his youngest daughter attains twenty-one.

[His Honour read the clause.]

No doubt here, if anywhere, some difficulty arises. Mr. *Dickinson* says you must take the property as divisible into sevenths, and then says that one of those sevenths is the ascertained share of any daughter dying before the youngest attains twenty-one, so that the child of that daughter is only to have one-seventh, leaving the rest to be divided amongst the three survivors. But I think the testator's meaning was this: he directs payment at a certain period amongst all his daughters, if alive; if not, then amongst his surviving daughters, share and share alike, regard being had to this, that if any daughter dies leaving a child, that child is to have the "mother's" share, by which I understand the share which the mother would have received had she been alive. That being so, the representatives of the child in this instance are entitled to one-fourth. The case of *White* v. *Baker* appears to have turned wholly on the particular language of the will. Not only did the words "executors, administrators, and assigns" occur, but the intention of the testator seems to have been to give vested interests. All these cases must depend upon the particular wording in each instance, and in this will the language is very peculiar.

I think there was no gift until the period of distribution; and

(1) 6 Ves. 249.

the only possible doubt would be whether it is correct to give one-fourth to the child, with the three surviving daughters. But any other construction would, I think, be irreconcilable with the intention, which seems to have been to put a child by representation in no worse position than the mother would have been had she survived.

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Declare that the fund is divisible in fourths.

LEATHER CLOTH COMPANY *v.* HIRSCHFIELD.

V.-C. W. 1865 *Nov.* 15.

Cairns' Act (21 & 22 *Vict. c.* 27)—*Measure of Damage—Trade Mark—Onus probandi.*

On an inquiry whether any and what damage has accrued to the Plaintiffs from the unlawful use by the Defendant of their trade-mark, the onus lies on the Plaintiffs of proving some special damage by loss of custom or otherwise, and it will not be intended in the absence of evidence that the amount of goods sold by the Defendant under the fraudulent trade-mark would have been sold by the Plaintiffs but for the Defendant's unlawful use of the Plaintiffs' mark.

THE bill in this cause had been filed to restrain the infringement of the Plaintiffs' trade-mark, and a decree had been obtained for an injunction. A decree for an account of profits had been offered by the Court, and refused by the Plaintiffs, who elected to take in lieu thereof an inquiry as to damages arising from the use by the Defendants of their trade-mark (1).

The present application was a summons adjourned from Chambers upon the inquiry.

There was evidence to prove that the Defendants manufactured several different qualities of leather cloth, and that they had at times sold pieces of cloth of three qualities impressed with the pirated trade-mark, but no evidence could be obtained by the Plaintiffs, or was offered by the Defendant, to show on what number of pieces the mark had been impressed. There was evidence to shew what number of pieces of the different qualities

(1) After the decree in this cause had been obtained, the House of Lords had in another suit decided that the Plaintiffs had no property in the trade-mark, the subject of this suit.

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was sold by the Defendant and the profit made by him on such sales, and it was shewn that the prices were lower than those which used to be received by the Plaintiffs for the goods marked with their marks, and that the profit was less.

There was contest on the evidence even on some of these points, but the above seem to have been the conclusions of fact so far as they can be supposed to have been determined.

Mr. *Dickinson*, for the Plaintiffs :—

As it is shewn that the Defendant sold some pieces of each of the three qualities impressed with the Plaintiffs' marks, the onus is thrown on him to shew how many were so impressed, and if he do not, it must be inferred that all he has sold of those qualities were so impressed. The principle is that damage once proved arising from the wrongful act of the Defendant, must, as against the wrongdoer, be intended to be the greatest possible under the circumstances, unless he shews the amount to which it is limited : *Armory* v. *Delamirie* (1); *The Duke of Leeds* v. *Amherst* (2); *Walmsley* v. *Walmsley* (3).

[The VICE-CHANCELLOR inquired what the Plaintiffs claimed as the measure of their damage].

The measure claimed is the amount of profit which the Plaintiffs would have made had the pieces of cloth sold by the Defendant under the fraudulent trade-mark been sold by the Plaintiffs.

[The VICE-CHANCELLOR referred to the cases of *Sykes* v. *Sykes* (4) and *Blofield* v. *Payne* (5) ; in the former, special damage had been proved, in the latter the jury, no special damage having been shewn, had found one farthing damages, and the finding was affirmed.]

In *Blofield* v. *Payne* it does not appear on what grounds the jury found one farthing only, and the case seems in nowise adverse to our contention, for the motion was not by the Plaintiff to set aside the verdict as having given too small damages, but by the De-

(1) 1 Str. 504; 1 Sm. L. C. 256, 4th ed.
(2) 20 Beav. 239.
(3) 3 J. & Lat. 556.
(4) 3 B. & C. 541. 5 D. & R. 292.
(5) 4 B. & Ad. 410.

fendant to enter a verdict for him, and on that motion the finding was affirmed which only shewed that there was damage intended by the law from a fraudulent act of the Defendant even where no special damage was proved, but was no authority for holding that special damage must in every case be proved.

Mr. *Locock Webb*, for the Defendant, was not called upon.

The VICE-CHANCELLOR adverted to the strange position in which the case stood, owing to the circumstances mentioned in the foot-note, which, he said, would have left him no course had he arrived at a decision adverse to the Defendant on the present application, but to allow him leave to appeal from the whole decree, and continued:—

In the case as it stands, however, I am not driven to that course; there is fortunately no declaration of right in the original decree, but merely an inquiry whether any and what damage has accrued to the Plaintiffs from the Defendant's use of their trade-marks. The Plaintiffs had their election to have taken an account of profits or of what damages had accrued, and preferred the latter alternative; they now require the Court to assume that they would have sold all the pieces of cloth which the Defendant actually did sell. But how can the Court assume that the persons who bought what the Plaintiffs aver were inferior articles at an inferior price, would necessarily, if they had not done so, have bought the superior articles at the higher price? Surely this would be an absurdly strong assumption, and that in the absence of any evidence that any of the purchasers had at any time been customers of the Plaintiffs. But even supposing that such an assumption were possible, why is the Court to assume that, even if the purchasers would have bought the higher priced article, they would have bought it of the Plaintiffs. There were or there may have been persons licensed by the Plaintiffs to use their trade-mark and to sell goods manufactured by their process, or there may have been, and doubtless were, persons who had purchased from the Plaintiffs, with a view of selling again, how can the Court assume that the supposed purchasers would have passed by all these persons and have purchased direct from the Plaintiffs? Yet this is what the Court is called on to infer from the mere fact

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that certain goods were sold by the Defendant, and that some of those goods were marked with imitations of the Plaintiffs' marks. Principle would seem to determine that no such assumption can be made, and that it lies on the Plaintiffs to prove some distinct damage from the use of their trade-mark by shewing loss of custom or something of that kind, which has not been done in this case. Authority, so far as it goes, seems to be to the same effect; in *Sykes* v. *Sykes*, special damage was actually proved, and in *Blofield* v. *Payne*, where it was not proved, the verdict was a merely nominal one; and though fraud was shewn, one farthing damages was held to have satisfied the requirements of the law. I must therefore hold that the Plaintiffs have suffered no damage by the Defendant's use of their trade-mark.

V.-C.W. 1865 *Dec.* 5, 20.

DAVENPORT *v.* RYLANDS.

Injunction—Cairns's Act (21 & 22 *Vict.* c. 27)—*Jurisdiction—Damages.*

Where a plaintiff has succeeded in shewing that at the filing of the bill he was entitled to an injunction to restrain an infringement of his patent, the Court will not at the hearing refuse him an inquiry as to damages, under Sir *H. Cairns'* Act, although the patent has expired pending the litigation.

Remarks on the form of an inquiry as to damages in cases of infringement of a patent.

THIS was a bill to restrain the infringement of the Plaintiffs' patent for the manufacture of chenille. The case made was that the Defendant had been in the habit of importing from abroad, and selling, chenille made by the Plaintiff's patent, both as a separate article of trade, and also as forming part of, and made up in, articles of millinery, in which the Defendant carried on a large trade. The bill sought, first, an injunction; 2ndly, an account of all the chenille manufactured by the Plaintiff's process, which without the Plaintiff's licence had at any time been manufactured, imported, or possessed by the Defendant, and of the sale thereof, and the profits derived by the sale; 3rdly, delivery up of all chenille, and articles made up, containing chenille manufactured by the patent process; 4thly, an inquiry what damages the

Plaintiffs had sustained by the manufacture and sale, manufacture or sale by the Defendant, of chenille, or of articles made up with, or containing chenille manufactured by the patent process without licence.

The defence raised on the affidavits was that the Defendant had bought the chenille in open market, in *England*, and without knowledge by what process it was manufactured, that on the Plaintiffs bringing to his knowledge the fact of the infringement, he had offered, if the Plaintiffs would be satisfied with such an arrangement and would refrain from taking proceedings, that he would cease from purchasing any such chenille except from the Plaintiffs; and that the Plaintiffs had departed apparently satisfied with the arrangement tendered; that the Defendant had complied with his promise, and had sold no chenille manufactured by the patent since that time, except the trifling residue he had in stock; that the Defendant had since purchased chenille for his business from the Plaintiffs to a considerable amount; that, however, without any further communication, the Plaintiffs, against good faith, had filed their bill, and the first information the Defendant had of their intention to proceed, was by the service of the bill filed. The Defendant traversed, but not on oath, the fact of infringement, that is to say, he refused to admit it. It appeared that since the filing of the bill on the 8th of November, 1864, the patent expired on the 13th of November, 1865.

There was some contest on the facts upon the affidavits, but the principal issues were determined in favour of the Plaintiffs.

Mr. *Willcock*, Q.C., and Mr. *Hardy*, for the Plaintiffs, discussed the evidence, and argued that even if the Defendant proved the arrangement, as it was called, it was no defence, but amounted to a mere *nudum pactum* against the Plaintiffs, who were entitled to the protection, not of the Defendant's promise only not to infringe, but of the order of the Court forbidding him to do so; there was no consideration given by the Defendant for the alleged undertaking on the part of the Plaintiffs not to proceed. The patent had expired since the bill was filed, but there were, or there might be, goods manufactured in fraud of the patent, still unsold, as to which unquestionably the Plaintiffs were entitled to

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an injunction; *Crossley* v. *Beverley* (1); and if necessary, they were entitled to an inquiry whether there were any such goods. They were in any case entitled to compensation in respect of the infringement already committed.

Mr. *Rolt*, Q.C., and Mr. *Little*, for the Defendant, argued that the defence set up amounted to an accord and satisfaction that the Defendant had given consideration by dealing with the Plaintiffs for all the chenille purchased since the date of the agreement alleged; that at the time of the filing of the bill there was neither threat nor intention to violate the patent, which was not disputed by the Defendant, and this distinguished the case from cases cited or referred to on the other side, where, though there might be no express threat, there was a constructive threat to violate by denial of the right to restrain such violation.

[The VICE-CHANCELLOR referred to *Geary* v. *Norton* (2).]

There was at any rate no right now to an injunction, for the patent had expired.

[The VICE-CHANCELLOR referred to *Price's Patent Candle Company* v. *Bauwen's Company* (3). Was there not a right to have an inquiry whether any, and what goods remained unsold which were manufactured before the 13th of November, 1865?]

Even as to such goods, if any there were, the Plaintiffs' remedy was complete in damages; and if that were so, then the Court had no jurisdiction to grant an injunction, and it was quite clear that in such a case, where the remedy ought to have been at law, and not in this Court, that there was no right to an account of profits, nor now to an inquiry as to damages; *Baily* v. *Taylor* (4); *Parrot* v. *Palmer* (5).

Mr. *Willcock*, in reply, was directed by the VICE-CHANCELLOR to confine himself to the point, that as there was no right to an injunction, there was none to account of profits, or to damages in this Court.

(1) 1 R. & M. 166, n.; S. C. Webster's Rep. 119.
(2) 1 De G. & Sm. 9.
(3) 4 K. & J. 727.
(4) 1 R. & M. 73.
(5) 3 M. & K. 632.

He argued that the terms of Sir *Hugh Cairns's* Act provided that wherever the Court had jurisdiction to "*entertain an application*" for an injunction, even though the injunction, if granted, would be unavailing, or even though the Court might have on the facts no jurisdiction to grant it, there was jurisdiction under the Act to grant damages, either instead of, or in addition to, an injunction; so where in a suit for specific performance of an agreement to grant a lease, the term might expire before the decree was made or carried out, the Court would have jurisdiction to grant damages. This cause was ripe for hearing, and was actually in the paper before vacation, while the patent was in full force, and the press of business in the Court could be no reason for refusing the Plaintiffs now what they would then have been clearly entitled to. The jurisdiction of the Court must be determined at the filing of the bill, and if it then existed, it was not removed by matter subsequent.

Dec. 20. SIR W. PAGE WOOD, V.C., after stating the facts and the questions that arose in the suit, observed:—

As to the question of accord and satisfaction, I did not hear Mr. *Willcock* in reply, because I considered the fact of the agreement not to have been sufficiently established, having been affirmed by one witness and positively contradicted by another. Moreover, nothing was stated upon which the Court could act, as being an equitable satisfaction of any claim the Plaintiff might have. All the conversation amounted to was, that one of the Plaintiffs said to the Defendant's agent, "You are not the kind of people we are anxious to interfere with: the persons we wish to get hold of are the large importers, who are damaging us considerably." Nothing more than this was said, so that if there were this supposed kind of accord and satisfaction, fresh wrong and damage was inflicted immediately afterwards. The consideration, also, was of the smallest kind, for all the Defendants promised was that they would buy in future of the patentee only. That could not amount to accord and satisfaction for the wrong already committed, either at law or in equity.

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The second point, on which I called for a reply, and which I confess has taken me some time and trouble to look into, was as to how far the Court is now in a different position under Sir *H. Cairns's* Act, from what it was anterior to the Act, when the patent has expired during the litigation.

As to authorities, I will only refer to the last, which is one of my own, and I only refer to it to say that I there had regard to the various authorities, and cited them in my judgment; I mean the case of *Price's Patent Candle Company* v. *Bauwen's Company* (1). In that case, the litigation had been going on for a long time; there had been a trial at law, and other inquiries had been entered into, in consequence of which the patent had expired; and I felt myself bound on the authorities to hold, it being impossible to grant an injunction, there being nothing to enjoin, and there being no property manufactured in violation of the patent during its continuance (as in the gas company's case) remaining unsold, that the Court could give no relief whatever. The Plaintiff declining an inquiry as to any remaining property, the bill was dismissed without costs. That decision was given in July, 1858, in the same session in which the Act was passed, which came into operation on the 1st of November following.

What has now to be considered is the effect of that statute, and with reference to that I am assisted by a decision of the Master of the Rolls in *Catton* v. *Wyld* (2). In that case an injunction was sought to restrain the pulling down of a wall; and pending the litigation, and before the hearing, the parties, by mutual agreement, built the wall up again, so that at the hearing there was nothing upon which the injunction could operate, and the question was whether the Court could do anything more than determine upon the costs. I suppose the Court could have determined upon the costs, because the doctrine that was once held by Sir *J. Leach*, that if parties chose to come to an agreement, the Court would not hear the case with respect to costs has since been considered not to be sound. But the point in *Catton* v. *Wyld* was whether there was any jurisdiction to do more, and ultimately the Court held that there was a ground for inquiry as to damages.

[His Honour read the judgment of the Master of the Rolls.]

(1) 4 K. & J. 727.

(2) 32 Beav. 266.

Now, undoubtedly, in this case, when the bill was filed, the Court had full jurisdiction to grant that injunction, which would have been awarded if the cause could then have been brought to a hearing. It so happened, partly, no doubt, from the Plaintiff not having made application to have the cause advanced, that the patent was allowed to expire, and at the hearing there was nothing to enjoin. But I cannot decide this case upon principles different from those which ought to govern the case, if the ordinary course of the Court had been pursued. It might be that, as in *Price's Case,* if the Plaintiff had been as diligent as he could have been in the prosecution of his case, the patent would have run out.

That being so, I have to look at the intent of the Legislature, which appears obviously to have been this, that parties should not be harassed, as they had been, by being told, after pursuing their causes at law, that a portion of the remedy could be given only in equity, and *vice versâ.*

Primâ facie, I was somewhat impressed with the notion that in order to award damages at the hearing, the Court must have jurisdiction to grant an injunction. But I think that would be a narrow construction to put upon this beneficial Act. If it were adopted in this case, and I were to dismiss the bill without costs, an action would be open to the Plaintiff, and thus the very mischief contemplated by the Legislature would ensue. A person coming here would be turned round and told, "Although it be true that the jurisdiction existed at the time of the filing of the bill, something has occurred since which prevents the jurisdiction attaching at the hearing, and, therefore, now, you must be left to go to law, and the whole matter shall be tried over again there. Although this Court has (assuming the construction of the statute I am adopting) full power to grant damages instead of the injunction, and settle the whole dispute between the parties; yet the Court will not do that, in consequence of something that has happened since the filing of the bill, and during the litigation." I think the sound view of the whole case is that I ought to exercise the jurisdiction granted to me by the Act, that I ought to consider myself as having had jurisdiction at the time the bill was filed, for the purpose of ultimately giving relief pursuant to the Act, and,

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therefore, I shall direct an inquiry as to what damage the Plaintiff has sustained; and I shall give the Plaintiff the costs up to the hearing.

The inquiry will be in the form, "what damage the Plaintiff has sustained," and not "what damage, if any," he has sustained, as it would be in the case of a trade-mark. There is this difference between the case of a trade-mark and that of a patent: in the former case the article sold is open to the whole world to manufacture, and the only right the Plaintiff seeks is that of being able to say, "Don't sell any goods under my mark." He may find his customers fall off in consequence of the Defendant's manufacture; but it does not necessarily follow that the Plaintiff can claim damages for every article manufactured by the Defendant, even though it be under that mark. On the other hand, every sale without licence of a patented article must be a damage to the patentee.

14 Ch D 337

The inquiry must extend to the sale by the Defendants of any articles manufactured by them within six years before the filing of the bill, and up to the expiry of the patent, by that process, the exclusive use of which was secured by the letters patent in the bill mentioned.

Mr. *Willcock* asked the Court to exercise its discretion of ordering the Defendants to pay the costs as between solicitor and client, as provided by the statute 15 & 16 Vict. c. 83, s. 43.

Mr. *Little*, *contrà*, said that this was a suit between parties, not a patent suit, in which the validity of the patent had been called in question. Hence, there was no ground for any departure from the ordinary rule.

SIR W. PAGE WOOD, V.C.:—

3 Eq 312. 5 Eq 65

The statute provides that the Plaintiff, on obtaining a decree, is to have his full costs, unless the judge shall certify that he ought not.

There are many circumstances under which it might be improper that the Plaintiff should have costs. The judge may think the first action to have been collusive, or he may think the case an

improper one. Many instances may be suggested; but the object of the enactment was to prevent patentees being put under the necessity of bringing repeated actions to determine their rights after the principle has been once established. The Plaintiff must have his costs as between solicitor and client.

V.-C. W. 1865 DAVENPORT v. RYLANDS.

In re EAST KONGSBERG COMPANY.
BIGG'S CASE.

V.-C. W. 1865 *Dec.* 19, 20.

Company—Contributory—Forfeiture of Shares.

A shareholder in a company received a notice that on non-payment by him of arrears of calls on a certain day, his shares "would be forfeited without further notice." He also knew that the question of winding up the company was under consideration. Two days before the day appointed for the payment of the arrears, he went to the company's office, paid the arrears on a few of his shares, and took a receipt, saying that on the rest he should submit to a forfeiture. The directors, at a board meeting, five days afterwards, examined the list of defaulters, and declared the shares of some of them, whom they considered as not solvent, to be forfeited; but they did not declare the shares of this particular shareholder to be forfeited, and they continued to treat him as the holder of the whole number of shares. The articles of association of the company provided that "in the event of non-payment at the time and place appointed by the notice, any share might thereupon be forfeited without any further act to be done by the company:"—

Held, that the shares upon which the arrears were not paid up, were not absolutely forfeited by the non-payment, and that the company's right of option remained; and, as the company had declared their intention of retaining the shareholder on the list, that he must, upon winding up, be held to be a contributory in respect of the full number of shares.

THIS was an adjourned summons, taken out by Mr. *Smith Henry Bigg*, to have his name struck off the list of contributories of the above-named company.

The company was incorporated under articles of association in July, 1859, and Mr. *Bigg* was the holder of 110 shares.

On the 17th of February, 1864, the company being about to be wound up by voluntary liquidation, a meeting of the directors was held to consider what steps should be taken with reference to such shareholders as were in arrear in payment of calls; and a

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resolution was then passed in accordance with the following minute, which was entered in the book.

"Ordered—That notice be given to all shareholders in arrears of calls, requesting payment thereof on or before the 26th instant, intimating also, that unless the same be then paid at the offices of the company the said shares would be then forfeited without further notice; the notice to contain clauses, Nos. 11, 12, 13, and 14, of the articles of association relating to the forfeiture of shares, and that particular attention be called to clause 14."

Accordingly, a letter, dated the same day, was written and sent to Mr. *Bigg*, amongst others, in these terms:—

"SIR,—I am desired by the Board to request that you will, on or before the 26th instant, pay to me at the above office the sum of £18 10*s*., being the amount of calls in arrear on your shares in this company; and I am further instructed to inform you, that in default of your so doing, your said shares will be forfeited without further notice, in pursuance of clauses 11, 12, 13, and 14, of the articles of association of this company, which are as follows:—

"11. If any shareholder fails to pay any call on or before the day appointed for the payment thereof, the directors may, whilst such calls remain unpaid, require him, by a notice in writing, to be served as is hereinafter provided, to pay the same or any part thereof that remains unpaid (either with or without interest) as aforesaid, until the day of payment, forthwith or on a day certain, and at such place as they shall therein appoint.

"12. In the event of non-payment at the time and place appointed by such notice, any share in respect of which such call has been made may be thereupon forfeited to the company without any further act to be done by it.

"13. Any share so forfeited shall become the company's property, and may be disposed of in such manner as it may think fit.

"14. Any shareholder whose share has been forfeited shall, notwithstanding, be liable to pay to the company all calls and fees owing thereupon at the time of the forfeiture.

"Attention is particularly requested to this clause.

"By order of the Board,

"R. S. PARKER (*Secretary.*)"

About the same date Mr. *Bigg* received a formal notice, stating that an extraordinary general meeting of the company would be held on the 29th of February, 1864, following the ordinary half-yearly meeting, for the purpose of passing special resolutions for the dissolution of the company and the appointment of liquidators. Desiring (as he said) to be present at this meeting, he determined to retain ten shares; and with this view he attended at the company's offices on the 24th of February, and paid so much of the call as related to the ten shares he wished to retain, and at the same time explained to the secretary that as to the remaining shares, he should submit to the forfeiture as provided by the note.

On the 29th of February three meetings were held. The first was a board meeting, at which the list of defaulters was read over, the shares belonging to shareholders whom the directors considered not to be solvent, were forfeited, and those belonging to shareholders whom they considered to be solvent, were not forfeited. In the latter class of shareholders was Mr. *Bigg*. The second was the ordinary half-yearly, and the third was the extraordinary general, meeting of shareholders. Mr. *Bigg* attended the last of the three meetings, at which resolutions for the winding-up of the company were adopted, and in the company's list of persons present at this meeting, he was entered as the holder of 110 shares. His name was afterwards settled on the list of contributories for the like number. Applications were made to Mr. *Bigg* by the solicitors of the liquidators in respect of this number of shares, which he resisted, and finally took out this summons on the 19th of July last.

The secretary of the company deposed that at the board meeting of the 17th of February, 1864, "a discussion arose among the directors present, as to the desirability of adopting the course he had suggested, and particularly as to what powers the directors possessed under the articles of association, with reference to the forfeiture of shares; and the directors having come to the conclusion that, under clause 12 of the articles, the forfeiture of shares upon which calls were in arrear, after notice, might follow immediately on the non-payment of the calls in accordance with such notice, determined on availing themselves of such power of

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forfeiture given by clause 12, and such determination was recorded in the minute-book, as above mentioned."

The chairman and one of the directors of the company stated that at the meeting of the 17th of February they determined to send out the notice to pay the arrears of call, because they thought such a threat would produce the money from all who were able to pay; but the directors never contemplated carrying out the threat of forfeiture in the case of any shareholder whom they considered solvent. There never was any intention on the part of the Board to forfeit Mr. *Bigg's* shares.

Mr. *Rolt*, Q.C., and Mr. *G. N. Colt*, in support of the application:—

We admit the liability as to ten shares. But as to the rest the company's notice, "I am instructed to inform you that, in default of your paying on or before the 26th instant, your shares will be forfeited,"—meant this: "You will know that your shares are forfeited, if you don't pay." Upon this Mr. *Bigg* acted; he went to the office on the 24th, tendered, and the company accepted, payment upon the ten shares only. This rendered the forfeiture complete: *Wollaston's Case* (1); *Webster's Case* (2).

Mr. *Daniel*, Q.C., and Mr. *J. W. De Longueville Giffard*, for the liquidators.

The letter of the company did not mean that the shares would be *ipso facto* forfeited by non-payment on the 26th. It would be monstrous to say that the mere facts of a man's being liable to pay, able to pay, and unwilling to pay, would be sufficient to release him from his legal liabilities. Some act on behalf of the company was necessary.

The foundation of the decisions which have been referred to was intention; and that the company had no intention of releasing Mr. *Bigg* from his liability, was abundantly clear from the evidence of what took place at the board meeting. The directors would have been guilty of a breach of trust if they had released a shareholder whom they had reason to believe solvent.

According to one of the reports of *Wollaston's Case*, there was not

(1) 4 De G. & J. 437; 28 L. J. (Ch.) 721. (2) 32 L. J. (Ch.) 135.

only a resolution followed by a notice to pay on penalty of forfeiture within twenty-one days, but there was an actual declaration of forfeiture, though before the twenty-one days had expired. This fact, however, does not appear in the report in *De Gex & Jones.**

It would be extremely dangerous to hold that, where articles of a company declare that upon non-payment of calls shares *may* be forfeited, and the secretary of the company writes to say they *will* be forfeited, without any further act on the part of the company, non-payment is to amount to forfeiture.

Mr. *Colt*, in reply.

If the principle upon which the decision is to rest is that of intention, how is the intention to be ascertained?

The directors tell Mr. *Bigg* that on non-payment his shares *will* be forfeited. On that announcement he acts, and the company take his money. Then they turn round and say, that *will* means *may;* and that all they meant was they had a right to forfeit if they pleased. But Mr. *Bigg* did not want to be told that; he knew it already from the articles of association.

If the intention was absolutely to forfeit in some cases, and in others merely to hold out the threat of forfeiture, why did not the company issue two separate forms of notice?

Sir W. Page Wood, V.C., after stating the facts relating to the terms of the articles of association and of the notice, continued:—

As far as the company are concerned (I am not, of course, considering now what the effect of their acts may be, I am merely mentioning what their acts were), they did not treat the letter of the 17th of February as operating as an actual forfeiture upon the termination of the period when the calls ought to have been paid. They did not treat it in that way, because they subsequently entered into resolutions forfeiting some shares and not forfeiting others; and including Mr. *Bigg* as one of the persons whose shares they did not cause to be

* From inquiries made, the Reporter has ascertained that in *Wollaston's Case* there was no declaration of forfeiture subsequent to the notice.

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forfeited. They also, when Mr. *Bigg* attended the meeting of the 29th of February, entered him as the holder of 110 shares, treating him therefore in their own private books, independently of Mr. *Bigg* himself, as still the holder of the shares, notwithstanding that payment had not been made. What occurred in the interval was this, that Mr. *Bigg*, a day or two before the expiration of the time when he was told that the shares would be forfeited paid upon ten shares, and he seems to have told the secretary at the same time that he intended to let the forfeiture operate as to the remaining shares. That is the exact state of circumstances which occurred.

Now I will first remark that the operation of these clauses of forfeiture must be considered, to see whether or not some determination on the part of the directors is not first necessary. I apprehend that some direction on the part of the directors is necessary as regards the company, although no operation on the part of the directors is necessary as regards the shareholder beyond giving him the notice.

In a case of *Moore* v. *Rawlins* (1), a question arose, which seems to have been treated very lightly, as if there could be hardly any doubt what the decision must be. It was given, in fact, during the argument rather than in the judgment at the close of the case, there being other points to be decided. The question was this—there being a clause that on non-payment of calls, the shares should be *ipso facto* forfeited—whether a clause of that kind relieved the shareholders. The clause provided that "if any member should, from any cause whatever, permit any monthly subscription on any share or shares held by him or her, to be in arrear for six months, such share or shares, and all moneys paid in respect thereof, should, at the expiration of such six months, become absolutely forfeited to the company." It was held that the neglect of a member to pay his subscriptions and fines for six months operated as a forfeiture of his share or shares only at the option of the directors. Therefore, upon that it is quite plain, that although the directors would be in a position to forfeit under the provisions of the deed, after they had once served a notice for payment, without any further act done by the

(1) 6 C. B. (N. S.) 310.

company, it did not follow that as between the company and the directors nothing more was to be done: it only meant this; that, as between the company and the shareholder, the company should have nothing more to do. As regarded him, they had simply to send him notice to pay; he must take notice of the deed, and if he had received notice to pay, without a word more being said on that day, his shares would be at the disposal of the company if the directors should think fit.

That, to some extent, favours the contention of Mr. *Bigg*, because it would have been enough to have given him the notice without saying more. But more was said, and in this form. He was told this: "If the calls are unpaid, then the shares will be forfeited without further notice, in pursuance of clauses 11, 12, 13, and 14."

Now, certainly, that notice would not, independently of *Wollaston's Case*, appear to me of itself to be absolutely conclusive in its form. The expression is very ill-chosen, vague, and ambiguous. In the first place, there is a slight degree of ambiguity in the word "forfeited," namely, as to whether it means annihilated and gone, or only forfeited so as to be placed at the disposition of the company; the shareholder's rights upon it, and his control over it, being at an end. In the next place, I observe that with regard to the argument of Mr. *Bigg* being damaged by having this notice sent him, and being left in a state of uncertainty whether his shares were actually forfeited or not—that is the provision of the deed. Undoubtedly, if the directors had given him that notice alone, he would have been left in such a state of uncertainty, that he would have been at liberty at any time he thought fit, to ask the directors to tell him aye or no—whether his shares were forfeited or not. Whether they could have been compelled to reply or not, is not a matter material to be inquired into; but, undoubtedly, if he had simply received the notice, he would have been left uncertain as to whether the shares were forfeited or not, and could only by further inquiry have obtained information upon the subject.

That being so, I have now to consider what was the actual decision in *Wollaston's Case*, and upon what principles it seems to have been founded. In *Wollaston's Case*, the directors came, in the

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first place, to a resolution among themselves, anterior to the sending of the notice, not merely that the notices should be sent, (which is the only resolution come to in the case before me), but "that those shareholders who had not fully paid and satisfied their calls should receive notice so to do forthwith, and that unless the shares were fully paid and satisfied within twenty-one days from the date of the notice, then the said unpaid shares should be immediately forfeited to the sole and exclusive use of the company." What, therefore, they did was this: they not only resolved that a notice should be sent, but they resolved what should be the consequence if, upon the sending of the notice, non-payment of the calls should occur; namely, that the shares should then be immediately forfeited. The question in that case was—whether they had a right *à priori*, and before it was known whether or not the notice would be complied with, to come to such a resolution. Not only was a letter sent, almost identical in terms with the letter in this case (for I do not think the expression "the shares will be immediately forfeited" makes any great difference), but they also sent with it a copy of the resolution. Now, that resolution was not only a resolution that the notice should be sent, but it was also a distinct embodiment of the decision of the directors, that the shares should, from that moment, be forfeited.

In the particular case before me, no determination of the kind was come to, the only determination was to send the notice, and that notice was accordingly sent.

In the case, however, before the Lords Justices, the subsequent proceedings which took place were treated as of considerable importance, as undoubtedly they were. For three years, in *Wollaston's Case*, both the parties who received the notice and the company who gave the notice acted upon it; and, therefore, evidenced in the best possible manner their intention of proceeding upon it. That was, no doubt, relied upon very considerably; and I did nothing more than follow the judgment of *Wollaston's Case*, in *Webster's Case*, where the notice was acted upon for one year. The very circumstance that those matters were pressed into the consideration of the case seems to indicate a degree of doubt on the part of the Lords Justices as to what

the immediate effect of the notice would have been, if it had stood alone.

Now, in this case, this gentleman at the same time he received this notice, received a notice of the intention to have the company wound up. That in itself would be an *indicium*, at all events, that the question of forfeiture would be one of serious importance, as between the company and himself. He is informed at the same time by this notice, that as far as he is concerned, his shares will be forfeited without further notice.

But this does not appear to me to be a notice so manifestly and clearly indicating to this shareholder that the company have already forfeited the shares—that they have already done the act, which seems to have been thought necessary in *Moore* v. *Rawlins* —indicating their decision, that the shares themselves were gone and forfeited for the benefit of the company—as to preclude me from taking the company to have said: "Here is your notice; here is a resolution on our part that we shall proceed to deal with your shares, pursuant to the provisions of which we send you a copy; therefore take care and place yourself, if you wish to save your shares, in a position in which you will not be subject or liable to forfeiture."

It appears to me that the case, upon that part of it, is considerably weaker than *Wollaston's Case*; because in *Wollaston's Case* the notice was distinctly conveyed to the shareholders that the option had been exercised, and the determination made—and the question being, whether or not the determination could be made *à priori*, regard being had to all the circumstances of the case, it was considered that the whole thing was complete, and must be dealt with as being an actual forfeiture of the shares.

In this case there has been no acting whatever beyond this gentleman paying on ten shares, and having meant to allow the remainder to be forfeited. Two days intervened before the meeting for dissolving the company was held. The company undoubtedly, as far as they were concerned, had not then come to the resolution by the directors of actually forfeiting the shares. That was a resolution which they came to afterwards; and I do not think that this gentleman is in a position to say, the company have done any act whatever which can put him in a worse position in con-

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sequence of his having received this notice, or that he is entitled to say the shares were actually *ipso facto* forfeited. He was only put by the notice in this position, that he knew that his shares might be forfeited without further notice by the company.

The summons will be dismissed without costs, the official liquidator to have his costs out of the fund.

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FEATHERSTONHAUGH *v.* LEE MOOR PORCELAIN CLAY COMPANY.

Company—Ultra vires—Lease of the whole property—Special power to majority.

A company was incorporated in the first place for "the working, preparation, and sale of porcelain clay," with power, if it should be deemed expedient, after the original business had become developed, to combine "mining operations" with the original business.

By the company's deed it was provided that it should be competent for any extraordinary general meeting, by a majority of two-thirds in number of the shareholders, to empower and require the directors to bind the company, and every shareholder thereof, to any act, deed, matter, or thing whatsoever, which the company, by virtue of its corporate capacity, or otherwise, or all the shareholders together, would be enabled to make, do, or execute, if the consent of every shareholder were given thereto. Also, that the directors should have power to make contracts, and in case it should be doubtful whether it was in the competence of the directors to conclude any contract, the same might be submitted to an extraordinary general meeting, and if sanctioned, should be binding upon every shareholder, whether under incapacity or not, in like manner as if every shareholder were *sui juris* and had consented.

The company obtained leases of land for ninety-nine years, commenced business in 1852, and paid one dividend, and no other, the undertaking not turning out successful:—

Held, that, after a period of nine years of unsuccessful working, a majority of two-thirds of the shareholders in general meeting were empowered, under the above clauses, to authorize the directors to make a valid mining lease for twenty-one years of the whole of the works and buildings of the company.

Semble, the clauses would not authorize the like majority to engage the company in an undertaking wholly unconnected with their original purpose.

THIS was a bill to set aside a lease of the buildings and works of the above-named company.

The Plaintiffs were the executors of *Walker Featherstonhaugh*, who was the registered holder of 800 deferred shares in the company, which was originally registered under the 7 & 8 Vict. c. 110, and formed by a deed of settlement dated the 21st of February, 1852, of which the parts material to the present question were the following:—

It was provided that the name of the company should be *The Lee Moor Porcelain Clay Company*, and that its business should, in the first instance, be "the working and preparation of porcelain clay and its adjuncts, or incidental products (not including the manufacture of bricks or tiles from such adjuncts or incidental products, which manufacture was not intended to form any part of the company's business), and the sale of such prepared clay and its adjuncts, or incidental products." The company might also, if the same should be thought expedient after the original business had become developed, combine "mining operations" with the original business, as secondary and subordinate thereto.

Clause 4 provided for the assignment to the company of two leases, one dated in September, 1834, from the Earl of *Morley* to *John* and *William Phillips*, for 99 years, of a right of mining in *Lee Moor* and *Torracombe Wood* and other lands in the parish of *Shaugh*, *Devon*, and the other in January, 1835, from the Earl of *Morley* to *John* and *William Phillips*, for 99 years, of *The Morley Clay Works*, consisting of buildings and rights of working china, and other clay, in the same lands, subject to certain rents and royalties.

The capital of the company was to consist of £100,000 in 4000 shares of £25 each, with power to increase by additional capital, not exceeding £20,000. Out of the original capital of £100,000, £80,000 was to represent the value of the existing leases, works, plant, machinery, and stock; and the remaining £20,000 was to be raised by the issue of shares.

The £80,000 was to be represented by 3200 paid-up shares, of £25 each; whereof 2000 were to belong to *John* and *William Phillips*, 660 to the Earl of *Morley*, and 540 to the partners in *The Naval Bank* (who were mortgagees from the *Phillipses* for £4000 in 1836, and a further charge of £3000 in 1841.) The

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remaining £20,000 were to be represented by 800 shares of £25 each, to be subscribed for.

The 1200 shares of the Earl of *Morley*, and of the Bank, and the 800 shares to be subscribed for, were to be entitled to a preferential dividend of £6 per cent. in priority to any dividend upon the 2000 shares of the two *Phillipses;* then such 2000 deferred shares were to carry a dividend of £6 per cent., and the residue of the profits were to be applicable to the payment of a further dividend in respect of all the shares.

Clause 21 provided, that at any time after the payment of a yearly dividend of £6 per cent., it should be lawful for the company to extend its business to mining operations, "but so that the preparation and sale of porcelain clay should always *bonâ fide* continue the main or principal business of the company."

Clause 30 was as follows:—

"That it shall be competent for any extraordinary general meeting, by a majority which shall consist of at least two-thirds in number of the whole number of votes recorded in relation to any of the matters provided for by this present clause, by any resolution or resolutions, to empower and require the directors, subject to such exceptions as hereinafter specified, and so far as the rules of law or equity will permit, to amend, add to, or repeal, all or any of the clauses, provisions, or stipulations herein contained, which may be in force for the time being, and also to make, do, or execute, and to bind the company and every shareholder thereof, to any act, deed, matter, or thing whatsoever, which the company, by virtue of its corporate capacity, or otherwise, or all the shareholders thereof together, is or would be enabled to make, do, or execute, if the consent of every shareholder were given thereto: provided always, that no general meeting, ordinary or extraordinary, shall have power so as to affect or alter the provisions of these presents respecting the mode of division of the profits of the company among the holders of shares in the original capital stock thereof as hereinbefore provided, or to affect or alter any arrangements which shall have been made upon the creation or issue of new shares under the power in that behalf hereinbefore contained in regard to the participation of the holders of such new shares in the profits of the company, or to affect or alter the provisions for the

indemnity of the officers, or as to the dissolution of the company, or the prolongation of its duration, or for limiting the liability of the shareholders to the assets of the company."

Clause 33 provided, that every preferential share should confer a single vote, and every three deferred shares should be equivalent to a preferential share.

Clause 51 contained the following stipulation: "The board of directors shall have power to enter into, establish, and make all such contracts, agencies, and arrangements of every description, in connection with the business of the company, as they the said board of directors shall deem expedient, subject nevertheless to the provisions of the said Act of Parliament and of these presents; and in case any contract or arrangement which shall be in contemplation shall be of a character materially affecting the rights and interests of the shareholders, so as to give rise to doubts whether it is within the competence of the directors to conclude the same, then, and in such case, whatever may be the nature of such contract and arrangement, so that the same be not in violation of the said Act of Parliament, or of the rights which are by the 30th clause of these presents specially protected against interference, the same may be submitted to an extraordinary general meeting of the company; and if sanctioned by such meeting, either in its original form, or subject to any modifications, such contract or arrangement, in the form in which the same shall so have received the sanction of such general meeting, shall become and be absolutely binding upon the company, and upon every shareholder therein, whether under incapacity or not, in like manner as if every individual shareholder in the company were *sui juris*, and had consented to such contract or arrangement in the form in which the same shall so have been sanctioned."

On the 27th of March, 1852, the company was completely registered, and on the 4th of March, 1854, a dividend was declared of £6 per cent. on the preferential shares, and three-quarters per cent. on the deferred shares. No other dividend had since been declared.

William Phillips, who was the acting manager of the company, died in 1861, and shortly afterwards his property at *Lee Moor*, including the brickworks, and his interest in a surface lease

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and railway, with stock and plant, were purchased by the company for £7897 7*s.*

In the same year, in accordance with certain resolutions duly passed, the directors obtained loans to the amount of £10,000, and also created and issued 800 new £6 per cent. preference shares of £25 each, which were principally held by directors.

After *William Phillips's* death, the management was, for a time, continued by his son; but the directors, finding that the business was not conducted at a profit, and that a large outlay would be necessary, owing to the erroneous construction of the works at the top of a hill, and the necessity of making new ones, in August, 1862, called a general meeting of shareholders, to consider the propriety of winding up the company. At this meeting, which was held on the 10th of June, 1862, out of a total of 3464 votes, 2735 were given; 2536 for winding up, and 199 against, the minority being the votes of a single dissentient shareholder. One of the plaintiffs, as representing his father, attended this meeting, accompanied by his solicitor, and was heard against the proposal; but did not vote, having omitted to obtain a proxy paper.

On the 11th of September a resolution was passed for winding up the company; but on the 14th the question was adjourned on the statement of the directors that an arrangement had been entered into for letting the works on favourable terms; after which the directors immediately advertised terms on which they were prepared to lease the works.

On the 12th of December Mr. *Walker Featherstonhaugh* sent a notice to the manager protesting against the letting of the works, and on the 20th of February, 1863, his solicitor wrote threatening a bill for an injunction, to which letter he received an answer on the 27th of February stating that the lease was executed.

On the same 20th of February the solicitor also wrote to Mrs. *Martin*, the intended lessee, stating that he was advised the directors had no power to grant the lease, and that, on behalf of Mr. *Featherstonhaugh*, he had given instructions to counsel to file a bill to restrain the granting of it.

The lease was dated the 12th of February, 1863, and made between two of the directors of the first part, three others of the second part, the company of the third part, and *Rebecca Martin* of

which was sanctioned by a General Meeting on the 17th Dec 1862

the fourth part. It comprised all the property in which, according to the deed of settlement, the operations of the company were to be carried on. The term was for twenty-one years from the 25th of December, 1862, and the annual rents were £800 for the first seven years, £1000 for the next seven years, and £1200 for the last seven years. There were also separate occupation rents and rents in respect of rights of way and water, amounting together to £330 10*s.*; and royalties were reserved on china clay and other minerals.

On the granting of the lease the directors disposed of the whole of the plant, machinery, implements, and stock in trade of the company.

On the 26th of March, 1863, Mr. *W. Featherstonhaugh* died.

This bill was filed on the 7th of August following, against the company, certain of the directors, and Mrs. *Martin*, the lessee. She had, in fact, died about a month previously, and her three sons, who, as her personal representatives, became the owners of the lease, were made Defendants by amendment, but not until April, 1864.

The bill charged that the lease "was inconsistent with the objects for which the company was formed, and that under the deed of settlement no general meeting, ordinary or extraordinary, could have power to authorize the directors to deal with the business of the company in a manner inconsistent with the objects of the company as defined by the deed of settlement."

The Plaintiffs further stated that "from the terms of the lease it was utterly impossible that the deferred shareholders could receive any interest or dividend whatever upon their shares during the whole period for which the lease was granted, while their liabilities or the liability of their estates would continue, and the bed of clay which the company was formed to work might be consumed and must at any rate be much diminished."

The company and directors by their answer insisted that "from the general scope of the deed of settlement, it appeared that the object of the enterprise was to raise capital and establish an organization for the working of the clay beds comprised in the leases, by some person or persons on behalf or for the benefit of the company, and that it was not contemplated that the company,

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or the directors, should themselves engage in or superintend the working of the enterprise as raisers or manufacturers. Accordingly, wide powers were conferred by the deed of settlement on *William Phillips*, the lessee and manager of the works; and it was obviously contemplated that such or similar powers vested in some person or persons other than the directors would be needed so long as the company continued to exist."

The Messrs. *Martin* put in a voluntary answer, insisting on want of notice and acquiescence, and stating that after great outlay in reconstruction of the works, the business was now being worked advantageously.

Mr. *Osborne*, Q.C., and Mr. *E. Macnaghten*, for the Plaintiffs:—

The lease is invalid as being inconsistent with the purposes for which the company was formed. The defined purposes are the working and preparation of porcelain clay. From this business the grant of a mining lease is a departure.

It is not in the power of the company to effect such a change as this by the machinery of the 30th clause. The exception, "so far as the rules of law and equity will permit," though declaratory only, bears especial reference to the 7th and 25th sections of the 7 & 8 Vict. c. 110, of which the former requires that the deed of settlement shall set forth "the business or purpose" of the company; and the latter enacts that, on registration, the then and all succeeding shareholders are incorporated "for the purpose of carrying on the trade or business for which the company was formed."

If the company wished to extend their business to mining operations they should have entered into a supplemental deed of settlement; *In re the Phœnix Assurance Company* (1).

The lease is bad within the principles laid down in *Natusch* v. *Irving*, (2) *Colman* v. *The Eastern Counties Railway Company* (3), and *Simpson* v. *The Westminster Palace Hotel Company, Limited* (4).

As regards the Messrs. *Martin*, the fact of notice having been once given on the 20th of February, 1863, was sufficient to exclude

(1) 2 J. & H. 441.
(2) *Gow* on Partnership, App. 398.
(3) 10 Beav. 14.
(4) 8 H. L. C. 712.

any equity that might be supposed to arise from acquiescence; *The Master of Clare Hall* v. *Harding* (1); and the rule as to the effect of lying by and allowing expenditure to go on has no application where there is knowledge of the real title; *Rennie* v. *Young* (2).

Mr. *Waley* and Mr. *Druce* (with them Mr. *Rolt*, Q.C.), for the company:—

The true construction of the 30th clause is this—If it should be found that the joint stock management is insufficient to make profits, then the company is to have power to lease the property. Mr. *Phillips* was dead, his management was found to have been unsuccessful, a large expenditure had become necessary. What would executors have done, if they had had this unremunerative property thrown upon their hands? They would have leased it. That is a test that the company, in leasing, were within the powers of this clause. Mr. *Featherstonhaugh's* objections amounted to this: he first said, "Don't do this;" and that failing, he then said, "You have no power to do it."

The lease was a legal lease, and *intra vires;* but at any rate it could not be set aside at the suit of these Plaintiffs. One of them was permitted to attend the meeting on behalf of his father; he did not vote, but he and his brother must be held bound by the resolution.

In the events that have happened, owing to the change of position, it will be impossible to restore the parties to their original *status; The Era Company* (3).

This is a company formed expressly for mining operations, and hence the principles laid down in the following cases apply: *Norway* v. *Rowe* (4), *Prendergast* v. *Turton* (5), *Whalley* v. *Whalley* (6).

The suit is defective; for if this be, as alleged, a breach of trust, a shareholder suing in respect of it must sue on behalf of himself and all the shareholders; *White* v. *Carmarthen Railway Company* (7).

(1) 6 Ha. 273.
(2) 2 De G. & J. 136.
(3) 1 De G. J. & S. 29.
(4) 19 Ves. 144.
(5) 1 Y. & C. C. C. 98; S. C. on Appeal, 13 L. J. (Ch.) 268.
(6) 2 De G. F. & J. 310.
(7) 1 H. & M. 786.

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Mr. *G. M. Giffard*, Q.C., and Mr. *E. Charles*, for the Messrs. *Martin*:—

With the single exception of the letter of the 20th February, 1863, the lessees had no notice of any dispute or adverse proceeding until the filing of the amended bill. Meanwhile heavy contracts had been entered into, the lessees being under covenants to work yearly 1200 tons of clay, with a proviso for re-entry. The Plaintiffs waited for the company's answer before they gave notice to the Messrs. *Martin*.

There was no actual change of business—only a change of management; and the course adopted by the company was an act of salvation requiring unanimity of action, a fact which of itself would bring it within the powers of the deed.

Mr. *Osborne*, in reply:—

Under a winding-up order the preferential and deferred shareholders would have come in *pari passu*, but by this device the property of the deferred shareholders was wholly confiscated. The buisness, if persevered in, might possibly hereafter turn out to be profitable.

The dictum in *Simpson* v. *The Westminster Hotel Company* is in the Plaintiff's favour, for was it ever heard that a company was incorporated for the purpose of making a lease of land?

The preponderance in number and votes of preferential over deferred shareholders rendered this bill the only remedy open to the Plaintiffs, who might be deferred indefinitely by renewals of the mining lease, whereas a sale of the effects might realize something for all the shareholders.

SIR W. PAGE WOOD, V.C.:—

It appears to me that I should be controlling improperly the effect of this deed, if I did not allow this company to do that act which through the medium of their directors they have done.

The whole case appears to turn on the 30th section, coupled with any observations that may arise upon the constitution of the company with reference to their preferential and other shares, as shewn by the other clauses of the deed. The question is, whether, under the unusually large powers conferred upon a meeting of

the shareholders by this deed (which are not by any means unreasonable powers), the company are not able to do that which they may deem best with reference to their own assets?

It was put very ably by Mr. *Waley* in the opening of the case, that the company having taken certain powers with reference to amending, altering, and varying the provisions in the deed, it might be conceded that all those powers tended to the altering, varying, or amending anything that might be requisite for the immediate carrying on of the business which was in hand, but that a crisis might come, in which it would be necessary to have powers larger than any which were contained in the deed. Something might have to be done with reference to the administration of the property of the concern, which would require a more effective control over the property of the company by the shareholders than could be given under any ordinary shareholders' deed, it being well known that, under an ordinary shareholders' deed, the only thing that can be done when difficulties arise is to make provision (if there is no power of sale contained in the deed) for the dissolution of the company and winding up of its affairs, in such manner as may be prescribed by the deed itself. There might arise, however, and it appears to me abundantly clear on the evidence that there did arise in this case such a state of things—that the company was placed in such a position with reference to its assets—that a dissolution was the necessary course, from the state at which the assets had arrived, unless, indeed, something else could be determined upon, or some other course could be taken in dealing with the assets. Mr. *Waley* put this pertinent question, whether any more natural interpretation of this clause could be conceived than to say that it was with reference to dealing with the assets in case of emergency that a power of such a description as is contained in this deed was inserted. The power is in these words: [His Honour read the clause as set out above]. Then this emergency has arisen. It was considered by a large majority of shareholders—by everybody, in fact, except the Plaintiff's testator—that a dissolution must take place. There were remonstrances by the testator, but everybody else came to that opinion; and, indeed, they passed a resolution at a meeting of the shareholders to that effect, that a dissolution should take

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place. That resolution had to be confirmed by a second general meeting. In the interval, and before the time for confirming it had arrived, a proposal came from some one more sanguine, apparently, than the shareholders of the company, after their unfortunate experience up to that time, who said: "I am prepared to erect new works, your old ones being quite insufficient for all the purposes for which the company is constituted. I will work your assets for twenty-one years, and I will deliver up the works at the end of that time with better machinery than I find here, better arranged and better placed" (for the whole scheme was to put the machinery at the bottom of the hill instead of at the top, which appears to have been an absurd arrangement); "and that being done, you shall have your property handed back, at the end of twenty-one years, in an available position."

Surely such an emergency as that is one which might well be contemplated. It was not actually specified in the deed, but the Company felt that an emergency might arise in which it might be difficult to deal with the assets in a manner most beneficial for all parties concerned, by reason of the incapacity of some and the unwillingness of others to consent, and therefore introduced this large power.

Now, of course, this power, although very large, would be controlled by the general scope, object, and purport of the deed. That is, in my opinion, the answer to Mr. *Osborne's* argument on the Act of Parliament and the authorities. Mr. *Osborne* says that by the Act of Parliament the company must state to the Legislature for what it is incorporated, and cannot deviate from the purpose for which it is incorporated, and the object it has in view, without having a supplemental deed, to be properly executed, as pointed out by the Act of Parliament, and having that supplemental deed duly registered. He says, that upon the authorities, beginning with *Natusch* v. *Irving* (1) downwards, the same state of law arises as upon the statute, namely, that persons having associated for one purpose, and having bound themselves to carry into effect that purpose, cannot, without the consent of every individual proprietor, be held to have bound themselves to enter into an engagement to carry out some totally different purpose.

(1) *Gow* on Partnership, 126, 257.

Now, although that class of decisions may not reach the whole of the case as contended for by Mr. *Osborne*, in this particular instance where there is such a clause as the present, it is quite enough for the present purpose to say that I should hold those decisions as still extending to the present clause, notwithstanding its largeness of power, which provides that acts done by two-thirds of the shareholders are to be just as binding as if every individual had consented. I should still, for the purpose of this decision, not find it necessary to hold that the clause proceeded to such a length as to justify a majority of two-thirds in determining that the Company could lawfully undertake, as if they had all consented, such a scheme as the working of a gold mine in South Australia, or any purpose utterly unconnected with any of the purposes of the deed. I do not think it necessary to extend the construction of the clause to such a case as that.

But I think there is a construction of the clause perfectly consistent with the decided cases, and with the Act of Parliament, which will authorize me so far to avail myself of the reasons and grounds of the decision of the House of Lords in the case of *Simpson* v. *The Westminster Hotel Company*, as to say that the test (at least for the purposes of this case) may well be—Have the company by this act which they intend to carry into effect by force of the clause, either on the one hand abandoned their purposes (these were the two cases put by Lord *Campbell*), or on the other hand, exceeded their purposes? Have they done either one or the other?

It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and, so far, they have agreed to take a rent for their property instead of working it themselves, and taking the profit. At the end of twenty-one years they are to have the whole of the property back, and, as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case), they would have it back in a more profitable condition at the end of the twenty-one years. They have not exceeded their powers, because nobody can contend that parting with their property for a certain time is exceeding their powers, beyond this, that during all that time they are not carrying on the business. But, as to that view, I apprehend that

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it is perfectly competent for a meeting to say: "China clay is in a very depressed state—the market is very bad—and we agree it is better not to work it for two or three years." That would be entirely within their functions, and they would not be said, in that respect, to have abandoned their work, or to have exceeded the functions allowed them.

Now I said I thought it would not be desirable to throw out any intimation that this clause would extend to give the Company authorities wholly beside the deed, and that view will be fortified by one clause in the deed, which seems to indicate plainly that the company themselves conceived, when they were giving large powers to the directors, that those powers were only to be exercised in conformity with the general stipulations of the deed. I mean the 51st clause, with reference to contracts, the effect of which is, that the directors may enter into contracts of any kind, and for any purpose, in carrying on the business, and provided (again following the same sort of form) it be not contrary to the Act of Parliament and the rules of law and equity, they are enabled to carry the contract into effect. But even there the company are jealous of conceding too large powers to the directors; and if any of the contracts shall appear to go beyond the exact limits of the authority of the directors; if there be any doubt in the minds of the directors, they are at liberty to submit the contract to a general meeting, and deal with it under the 30th clause.

Therefore, the 51st clause would—I do not say be restrictive of this, but it would in some degree—be explanatory and interpretative of what it meant, namely, "We do not mean to give you a wild random power to apply our money to any purpose you may think proper, so long as you can get two-thirds of the shareholders to take that view; but we mean to have the largest control over the whole of the property of the company." That is the true construction of the clause. I read it in this way, that here is a considerable property in hand, and £120,000 about to be raised. Who can tell what may be all the incidents arising from working a speculative concern like this *China Clay Company*, by means of that capital? "In order, therefore, that neither the directors nor ourselves may be embarrassed by unforeseen incidents in the management of this property, we will take care to vest the power

in two-thirds of the shareholders of the company to say what, under any contingency, or in any emergency, is best to be done." I do not think I am thus putting a construction on the instrument beyond the provisions of the Act of Parliament, and the decided authorities.

That being so, I have only to look at the consequences that have arisen. Perhaps I am hardly justified in doing so, if I am right in my construction. It is for the company to judge what is best on an emergency; but with reference to what has been suggested to me as giving a clue to the interpretation of the clause as to the hardship upon the deferred shareholders, I think it necessary, first, to say a few words upon what the position of the company was.

Then I take Mr. *Osborne's* observation. He says, independently of the observations arising on the general Act and the decided cases, there is something special in the construction of this company, which renders it necessary for the Court to hold its hand, with reference to a matter of this description, which, as part of its consequences, tends to give an undue advantage to the preference over the deferred shareholders. The scheme of the company is this—that the preference shareholders are to have £6 per cent., there being certain deferred shareholders who can take nothing until that £6 per cent. has been paid; and then, it so happening at the present time that there is a majority of two-thirds composed of the preference shareholders, it is possible, by such a construction as is asked by the Defendants to be put on the deed, to leave the deferred shareholders entirely at the mercy of the preference shareholders, and enable them to defeat all the interests of the deferred shareholders. He says that is a necessary consequence, and therefore that the Court has imposed upon it the duty of giving a more limited construction to the power given by the deed.

The first answer to that, I apprehend, would be, that the persons who entered into this engagement knew exactly the constitution of the company. Those who took deferred shares knew they had deferred shares, and those who took preference shares knew they had preference shares; and they entered into the deed with the clause before them, being willing to trust to two-thirds of the

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shareholders, at a general meeting, all the authorities and powers here conferred. Hence the Court would not be justified in saying that, because an act done may incidentally give a benefit to the preference at the expense of the deferred shareholders, therefore there is a fraudulent or improper exercise of the power; and I take it that the construction of this clause is not in any way altered by the circumstance on the face of the deed, that there are two distinct classes of shareholders. If those who knew that there were two distinct classes of shareholders have granted power to two-thirds of the shareholders, be they who they may, it does not appear to me to be a legitimate argument to say that, because a certain act may result in an advantage to the one over the other, and those who are deferred may be defeated by those who have the preference, therefore the construction of the deed cannot be such as I have considered it to be.

If that be so, there remains only the suggestion of fraud. Of course, there may be a fraud; the fullest power may be exercised fraudulently. As regards that part of the case, it is hardly put by the bill—it is only put by way of consequence—the consequence of your act may be so and so. That may be a very natural result, and yet may not indicate any impropriety in the act committed. In truth, it appears to me, if I may say so, that the shareholders have acted not only with perfect *bona fides*, but in a manner absolutely essential to the benefit of the shareholders in this respect.

The shareholders, whether preferential or deferred, have not received one sixpence for nine years. That was the state of the company when this arrangement was made. An absurd construction of the works had taken place; the works had been placed on the top of a hill, where they could be of no use; the company was largely in debt; they had borrowed £10,000 on mortgage; and the only resources they had were a sum of £2000, which was not called up at that time, and the £6000 or £7000 which would come from the preferential shareholders, if they were disposed to advance it. Having to remove their whole machinery, which was disheartening enough; having failed, during nine years, to extract anything from their mines; being in such a condition, moreover, that the leases were held with a burden of £250 or

£300 a-year dead rent, with a condition as to working and the like, on a breach of which forfeiture might take place—having all this before them, they come to the conclusion that they must abandon the whole concern; and that conclusion (which is very important with regard to the *bona fides*) is come to before the lease was ever heard of, or thought about. They meet accordingly, and determine to dissolve. The testator, whom the Plaintiffs represent, took a very sanguine view—that is to say, inasmuch as he had no more calls to pay on his shares, he wished the shareholders to embark a little more money in the concern, and see if they could not make something out of it. He was a shrewd man of business, and no one can make any complaint of his having taken that course. But they said, "We do not like that: we think it better not to go on; we think we should dissolve;" and they *bonâ fide* determined to dissolve. They advertised a second meeting to confirm the dissolution, the testator insisting they must go on with the works. Then they heard that somebody was willing to take a lease.

That brings me to the sort of case I suggested. Suppose they had found the china clay works unprofitable—through bad management, if you please—and that they could in no way make them profitable; and suppose—not the case that has actually occurred, of a lease that only gives a surplus rent to the preference shareholders—but that somebody had been found more adventurous still than Mrs. *Martin*, who would have offered to take a lease which would have given some fraction of profit to the deferred shareholders as well, and that, instead of paying £1200 a-year, she had agreed to pay £3000 or £4000—I don't suppose I should have heard any argument before me about the want of power. The question would have been rather, whether such a course of proceeding by directors would have been legitimate.

The lease is not for the whole term, but only for twenty-one years, leaving fifty years to come afterwards; and here is a person who comes forward and says: "I will take your discredited concern, which has not paid for nine years—a thing which nobody will take shares in—which is on the very verge of dissolution—upon which will ensue a total break-up, with large debts on a concern not likely to find a customer. I will indemnify you against all

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charges, relieve you from all burdens, give you a clear profit of some hundreds a-year, and at the end of twenty-one years engage to leave you the property in a much better condition than I find it." That is the proposition that is made; and I have to consider whether that is not truly and legitimately within the scope of a clause which says that two-thirds of the meeting may determine with reference to this body anything whatever which the whole body of shareholders could determine.

If I had the whole body of shareholders *sui juris* (for that is the object of the clause), could I hold that I could restrain the whole body from entering into any arrangement for leasing their property, and disposing of it in the manner described? I apprehend that, so far from that, if they had not been *sui juris*, the Court would in such a case have been very glad to give them its assistance. As Mr. *Waley* put it, if the Court were administering the assets in Chambers, and the proposition were made with reference to administering such assets on the part of the testator, the Court would be of opinion that it was a very proper and reasonable arrangement to make.

The strongest ground I have had to weigh is that the Plaintiffs say: "If the assets were divided, there might be something coming to us." It is by no means clear, to my mind, that there would be a single sixpence coming to them. They, however, say: "By this arrangement, we are kept for twenty-one years in the same state as we have been for nine years before—we shall not have a farthing; and at the end of that time, in the general opinion of the shareholders, there may be some hope of making this mine, which has been in so unfortunate a condition, prosper." But the fact that the deferred shareholders will be put into that position, I apprehend, amounts to nothing, unless you can make out that there was a fraudulent intention.

I deal with Mr. *Osborne's* argument, that, at the end of twenty-one years the same thing may be done, and then, at the end of another twenty-one years, the same thing may be done again; and so on—by observing that he is not to assert his rights like the dog in the manger, and say, "Nobody shall make any profit, because I cannot make any."

If the slightest mixture of fraud could have been established in

the motives of those concerned in this transaction, it would have been a different matter. But here it is neither shewn nor even alleged. All the circumstances in the case, from the beginning to the end, appear to me to have been done *bonâ fide* with a view of making the most of the assets of the company. That being my opinion, I hold, that making the most of the assets of the company was the very object of giving that large and general power contained in the clauses of the deed.

In that view of the case, it is unnecessary to enter into the question of *laches*. I think there is great complaint to be made of Mr. *Featherstonhaugh* and his representatives, as to the course they have taken; but I do not pursue that question further than the facts shew, which are these—that this gentleman, protesting, as he called it, in December, knowing that there was the advertisement out for tenders, knowing that there was an intention of granting the lease, knowing that there was an agreement to confirm the lease, does not give the slightest intimation to the person who had tendered, until the lease had actually been sanctioned by the company on the 17th of December, and had been actually executed by the company on the 12th of February, and the intended lessee had been in possession, and doing something on the works ever since December. Then the bill is not filed in the testator's life-time, although he lived until the 26th of March, and as he was well enough to be sending these notices, he must have been in as good a state of health as was necessary for the purpose of filing a bill. And when the bill is filed in the August following, the lady being dead, the Plaintiffs are told that the representatives ought to be made parties; but they are not made parties till April.

That is not a very favourable case with which to come into equity, with reference to mining property.

I do not, however, decide the case upon that ground; my decision rests on the higher ground that what has been done was authorized to be done by that very large power conferred by the deed, and, therefore, I must dismiss the bill with costs.

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1865

LINGWOOD *v.* STOWMARKET COMPANY.

Practice—Injunction—Nuisance—Form of Order.

IN this case, which is reported ante p. 77, the order was finally drawn up in the following form :—

"This Court doth order that a perpetual injunction be awarded against the Defendants, the Stowmarket Company, to restrain the said Defendants, their servants, agents and workmen, from discharging from their works in the Plaintiff's bill mentioned, into the river or stream in the said bill also mentioned, so as to cause it to flow to the Plaintiff's land, messuage, and mills, therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the Plaintiff, any such refuse or other matter as was discharged by the Defendants from the same works into the said river or stream previously to the filing of the said bill, or any noxious fluids or other foul matters whatsoever."

DICKINSON *v.* BURRELL.
ANN DICKINSON *v.* BURRELL.
STOURTON *v.* BURRELL.

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Jan. 22, 25.

Champerty—Voluntary Conveyance—Right of Grantee to set aside previous voidable Conveyance—Parties.

A conveyance, whether voluntary or for valuable consideration, of property, which the grantor has previously conveyed by a deed voidable in equity, is not void on the ground of champerty.

The right of instituting a suit to set aside a conveyance on equitable grounds passes by the grantor's subsequent conveyance of the same property, and the grantee under the subsequent conveyance may institute such suit without making the grantor a co-plaintiff.

A. having executed a conveyance of real estate to *B.*, which was liable to be set aside on equitable grounds, afterwards made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain twenty-one, or (being daughters) should marry, in equal shares.

Held, that the infant children of *A.* could maintain a bill, making *A.* and the trustees of the settlement defendants, to set aside the conveyance to *B.*

THESE were three demurrers by the same Defendant, *John Edens*, to three bills, seeking to set aside three several conveyances made to him by *James Dickinson*, *George William Dickinson*, and *William Lambert* and *Harriet* his wife, of their respective shares of the real estate of *George Whitehead*, deceased.

The case made by the bill in *Dickinson* v. *Burrell* was as follows:—

By an indenture dated the 2nd of November, 1857, *James Dickinson* being entitled to four-fifteenths of four-sevenths of the real estate of *George Whitehead*, which was the subject-matter of two suits of *Whitehead* v. *Lynes* and *Stidolph* v. *Dickinson*, and was then in the possession of a receiver in those suits, in consideration of £100 conveyed a moiety of his share to *William Cross*, his heirs and assigns, and by an indenture of the 18th of December, 1860, in consideration of £100, he conveyed the other moiety to *Edens*, his heirs and assigns.

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On the 22nd of March, 1862, a decretal order was made by the Master of the Rolls in the suits of *Whitehead* v. *Lynes* and *Stidolph* v. *Dickinson*, on the Petition of, amongst others, *James Dickinson*, *Cross*, and *Edens*, whereby, amongst other things, it was declared that *Cross* was entitled to fifteen-thirtieths (including a moiety of *James Dickinson's* share), and that *Edens* was entitled to eleven-thirtieths (including the other moiety of that share) of four-sevenths of *Whitehead's* estate, and the receiver was ordered to pay those proportions of the rents to *Cross* and *Edens*, and part of the estate was ordered to be sold.

By a voluntary settlement, dated the 14th of April, 1864, which recited that *Cross* and *Edens* claimed to be entitled to the share of *James Dickinson* in *Whitehead's* estate by virtue of certain conveyances, but that *James Dickinson* disputed the validity of such conveyances, *James Dickinson* conveyed all his share in *Whitehead's* estate, and the proceeds of the sale thereof, to two trustees, upon trust to recover and receive the same, and out of the moneys to be received to pay certain costs, and to pay £200 to *James Dickinson*, and to stand possessed of the residue of such moneys and of the unsold estates upon trust for *James Dickinson* for life, and after his death upon trust for his children or remoter issue, as he should by will appoint, and in default of appointment in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares, with a power for the trustees to invest any part of the trust property not exceeding £500 in the purchase of the goodwill of a business for *James Dickinson*, and a power for *James Dickinson* to appoint £50 a year out of the income to his widow for life.

James Dickinson had eight children; five of them were infants, and were the Plaintiffs in this suit; the other three children, *James Dickinson* himself, and the trustees of the settlement, were Defendants.

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The bill alleged that the conveyances to *Cross* and *Edens* were improperly obtained by the Defendant *Burrell*, who was then acting as solicitor for *James Dickinson* in relation to *Whitehead's* estate, partly or wholly for his own benefit; that the considerations were inadequate; that *James Dickinson* was in indigent circumstances, and ignorant of the value of the property, and had no other

adviser than *Burrell;* and that the Petition, upon which the order of the 22nd of March, 1862, was made, contained false allegations, and that *James Dickinson* was named as a petitioner by *Burrell* without authority; and it prayed that such order, so far as it declared the right of *Cross* to fifteen-thirtieths, and of *Edens* to eleven-thirtieths, of four-sevenths of *Whitehead's* estate, and ordered payment to them accordingly, might be declared to have been improperly obtained, and that such part of the order might be set aside, and that the indentures of the 2nd of November, 1857, and the 18th of December, 1860, might be cancelled upon *Cross* and *Edens* being repaid the consideration money with interest, and that the Plaintiffs and the other persons interested under the settlement of April, 1864, might be declared entitled to four-fifteenths of four-sevenths of the produce of the sale of such part of *Whitehead's* estate as had been sold, and of the unsold part of the same estate.

The other two bills, both of which were filed by infants claiming under settlement of other shares in the estate, the next friend being the same in all three suits, were precisely similar as to the interest of the Plaintiffs, the case made by the bill, and the relief sought, to that in *Dickinson* v. *Burrell*, except that the interest of the Plaintiff in *Stourton* v. *Burrell* under the voluntary settlement was subject to a general power of testamentary appointment reserved to the settlor in that case, Mrs. *Lambert.*

In *Stourton* v. *Burrell* neither Mr. nor Mrs. *Lambert*, whose conveyances to *Cross* and *Edens* were sought to be set aside, and who were also the settlors and tenants for life under the settlement, nor the trustees of the settlement, were parties.

Edens demurred to each of the bills for want of equity, and to the bill in *Stourton* v. *Burrell* also for want of parties; the latter demurrer was not resisted by the Plaintiffs' counsel.

Mr. *Selwyn*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Hemings*, in support of the demurrers:—

Assuming that a case is established for setting aside these conveyances at the suit of the conveying parties, the present Plaintiffs cannot institute suits for that purpose. At the time of the voluntary settlements, each of the settlors had parted with all his and her interest in the property for valuable consideration;

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the settlements, therefore, conveyed nothing but the right of suit to set aside the previous conveyances, and such a conveyance is contrary to public policy on the ground of champerty, and will not be supported in equity: *Prosser* v. *Edmonds* (1), *Cockell* v. *Taylor* (2), *Anderson* v. *Radcliffe* (3), 2 *Story, Eq. Jurisprudence* (4). Even if a *bonâ fide* sale of such a right or interest could be supported, so as to enable the purchaser to institute a suit to set aside the prior sale, it is otherwise with a voluntary settlement which the settlor can at any time avoid by a subsequent conveyance for value. These settlements reserving so large an interest to the settlors were obviously made for the sole purpose of enabling the present suits to be instituted in the names of infants, to embarrass the Defendant, and prevent him from obtaining discovery from the settlors except by calling them as his own witnesses. The interest of the Plaintiffs, being contingent, reversionary, and defeasible by the settlors' subsequent conveyance for value, and, in the case of *Stourton* v. *Burrell*, also by the testamentary appointment of Mrs. *Lambert*, is not sufficient to entitle them to institute the suits: *Davis* v. *Earl of Dysart* (5), *Pennell* v. Earl of *Dysart* (6).

They also contended that the bills did not make a sufficient case of fraud to set aside the conveyances to the Defendant *Edens*.

The MASTER OF THE ROLLS desired the Plaintiffs' counsel to confine their arguments to the question of the Plaintiffs' right to sue.

Mr. *Southgate*, Q.C., and Mr. *F. Webb*, in support of the bills:—

There is no rule in equity prohibiting the assignment of property which the assignor is entitled to recover by a suit. The right of suit is incidental to the property, and does not affect the right to assign it. In *Prosser* v. *Edmonds* (1), Lord *Abinger* seems to have relied upon the circumstance that the assignor had no complaint to make and refused to be a Plaintiff. But some of the *dicta* in that case go too far, and have never been followed. Champerty and maintenance are *mala prohibita* only, and transactions ana-

(1) 1 Y. & C. Ex. 481.
(2) 15 Beav. 103, 116.
(3) E. B. & E. 806, 819.
(4) s. 1040 g.
(5) 20 Beav. 405.
(6) 27 Beav. 542.

logous but not actually amounting to champerty or maintenance may be sustained in equity: *Hartley* v. *Russell* (1), *Harrington* v. *Long* (2).

[The MASTER OF THE ROLLS referred to *Knight* v. *Bowyer* (3).]

The right to set aside a conveyance on equitable grounds passes by devise and descends to the heir: *Stump* v. *Gaby* (4), *Gresley* v. *Mousley* (5), *Uppington* v. *Bullen* (6).

Mr. *Selwyn*, in reply:—

If the heir or devisee were not entitled to set aside the voidable conveyance of the ancestor or devisor the right would be altogether lost, but no such reason applies to the case of a grantee whose grantor is alive and declines to sue.

Jan. 25. LORD ROMILLY, M.R., after shortly stating the case made by the bill in *Dickinson* v. *Burrell*, continued:—

Upon the allegations contained in the bill I am of opinion that a case is made out, upon which, if proved as there stated, this Court would give relief at the instance of the proper persons. The only question, therefore, that I have to determine is, whether, by reason of the deed of April, 1864, the Plaintiffs have a right to ask for that relief, when their father, the settlor, and the trustees of the settlement have refused or declined to concur in asking for such relief.

The demurrer is mainly supported on the case of *Prosser* v. *Edmonds* (7), which was decided, after long deliberation, by Lord *Abinger*; but I am of opinion that the case before me does not fall within the rule established by that decision.

In the first place, I will consider this case as if the indenture of April, 1864, had been executed for a valuable consideration, and then I will consider the difference, if any, arising from the circumstance that the deed was voluntary.

(1) 2 S. & S. 244.
(2) 2 My. & K. 590.
(3) 23 Beav. 609; 2 De G. & J. 421.
(4) 2 D. M. & G. 623.
(5) 4 De G. & J. 78.
(6) 2 D. & War. 184.
(7) 1 Y. & C. Ex. 481.

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Assuming the deed of April, 1864, to have been executed for value, then the right of suing is incidental to the conveyance of the property, and passes with it; that is, if *James Dickinson* had thought fit, after the sale to *Edens* in December, 1860, to sell the same property to *A. B.*, saying that the previous sale was a fraudulent one, and that though he himself would not take any steps to set it aside, if *A. B.* thought fit to do so he might, and that he would sell all his interest in the property to *A. B.* for a sum of money then *bonâ fide* agreed on, in such a case, in my opinion, *A. B.* could have maintained this suit.

The distinction is this: if *James Dickinson* had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, *A. B.*, to maintain this bill; but if *A. B.* had bought the whole of the interest of *James Dickinson* in the property, then it would. The right of suit is a right incidental to the property conveyed; nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it; for instance, if the property had been conveyed by *James Dickinson* to three persons as tenants in common, each one might have instituted this suit, making the other two tenants in common Defendants if they refused to concur as Plaintiffs: Provided that the case was so brought before the Court that the whole matter might be determined in one suit, so as to bind all parties to the transactions, and so that *Edens* would have had only to contest the question once; then, in my opinion, the suit might be instituted by a person having only a limited interest in the property conveyed; neither would it be material whether that interest was an undivided share in fee simple, or whether it was only a life interest, or an interest in reversion. In truth, any interest which, but for the previous deed, would have been sufficient to enable a person interested to ask this Court to secure the property for the benefit of the persons interested therein, would, in my opinion, enable that person to ask this Court to set aside the deed obtained by fraud, which, if valid, would have prejudiced or destroyed his interest in the property purported to be conveyed to him. I think that the distinction between the

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conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, is taken by Lord *Abinger* in the case of *Prosser* v. *Edmonds* (1). The distinction is also taken in *Cockell* v. *Taylor* (2) and in *Anderson* v. *Radcliffe* (3), and has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense. I am, therefore, of opinion that if the present Plaintiffs had given valuable consideration for the execution of the indenture of April, 1864, they would have been entitled to maintain this suit.

I have next to consider whether the fact of the conveyance being voluntary alters or affects this right. I am of opinion that it does not. There are, no doubt, various circumstances which may be connected with a voluntary deed which will induce this Court either to set the deed aside, or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat a voluntary deed, which would be otherwise valid; but assuming a voluntary deed to be complete, *bonâ fide*, and valid, and to be unaffected by any statutory disability, I know of no distinction between such a deed and one executed for valuable consideration. The estates and limitations created in such a deed have the same operation and effect as in a deed executed for value, and must be construed in the same manner, and it carries with it all the same incidents and rights attached to the property conveyed as are carried by a deed executed for value, and the grantee, in this respect, stands exactly in the same situation as if he had paid value for the property conveyed.

It is contended that in a case of this description the fact that the conveyance is voluntary suggests the possibility of some secret understanding, or subordinate agreement, by which the property, when recovered, is to be reconveyed, or to be discharged from the trusts, and that, in fact, the voluntary conveyance is made only colourably, and for the purpose of instituting or maintaining such a suit as the present. This may possibly be shewn hereafter in the progress of the cause, but on this demurrer, where I am bound to take the allegations as true, I cannot entertain any such suspicion. I am bound by the allegations in the bill, which I must

(1) 1 Y. & C. Ex. 481. (2) 15 Beav. 103.
(3) E. B. & E. 806.

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assume to be true, and that being so, the right to sue is, in my opinion, incidental to the interest conveyed to the Plaintiffs, and the demurrer must be overruled.

The order of 1862, declaring the rights, does not, in my opinion, affect the question at all, because the making of that order was merely incidental to the supposition by the Court that the deed was a good deed, and if the deed is set aside, then it would be a matter of course for the Court to alter the order.

The question that I have disposed of substantially decides the other two demurrers for want of equity. In the case of *Stourton* v. *Burrell* neither the trustees of the settlement nor Mr. and Mrs. *Lambert*, who conveyed the property to the Defendant *Edens*, and who are interested under the settlement, being parties, the demurrer for want of parties must be allowed; but the Plaintiff must have leave to amend, and in this case there will be no costs. In the other cases the demurrers must be overruled in the usual way.

Solicitors for the Plaintiffs: Messrs. *Stephens & Smith.*
Solicitor for the Defendants: Mr. *E. Burrell.*

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ENGLAND *v.* LORD TREDEGAR.

Insurance Company—Lost Policy—Indemnity.

An insurance company paying under a decree of the Court the money payable under a lost policy are sufficiently indemnified by the decree, and are not entitled to any indemnity from the persons to whom the money is paid.

THIS was a suit by the trustees of the marriage settlement of *Francis Dancer* against the trustees of the *Equitable Assurance Office*, to obtain payment of the money payable under a policy on the life of *Dancer*.

The policy was effected in the year 1803, pursuant to an agreement in the settlement, in the names of the original trustees of the settlement, and was held upon the trusts of the settlement. It was delivered to them, but had been lost for many years. The

original trustees were dead, and the Plaintiffs having been duly appointed trustees, the policy was assigned to them in 1863 by the representatives of the survivor of the original trustees, and notice of the assignment was given to the assurance office. The Plaintiffs were also the executors of *Dancer*, who died in December, 1864.

The Defendants did not dispute the title of the Plaintiffs, but on account of the loss of the policy declined to pay the money without an indemnity.

The Defendants had paid the money into Court under an order in the cause, and the Plaintiffs had instituted a suit of *England* v. *Lavers* for the administration of the trusts of the settlement.

The cause now came on upon motion for decree.

Mr. *Selwyn*, Q.C., and Mr. *Druce*, for the Plaintiffs, asked that the fund might be transferred to the credit of the cause of *England* v. *Lavers*, and contended that the Defendants were not entitled to any further indemnity than the decree of the Court: decrees for payment without indemnity had been made in *Crokatt* v. *Ford* (1) and *Field* v. *Barnewall* (2).

Mr. *Southgate*, Q.C., and Mr. *Dickinson*, for the Defendants, insisted that they were entitled to an indemnity, according to the decree in *Bushnan* v. *Morgan* (3). No doubt the title of the present Plaintiffs was clear, but the refusal of an indemnity in this case would be made a precedent for other cases in which the title of the claimants might be more doubtful.

LORD ROMILLY, M.R.:—

I think that the decree of the Court is a sufficient indemnity. Vice-Chancellor *Stuart* has so held in a reported case, and Mr. *Druce* tells me that Vice-Chancellor *Wood* has made a decree on the same principle.

Solicitor for the Plaintiffs: Mr. *Kearsey*.

Solicitors for the Defendants: Messrs. *Bray, Warren, Harding, & Warren*.

(1) 25 L. J. (Ch.) 552. (2) V.-C. *Wood*, 1854, unreported.
2 Jur. N.S. 436 (3) 5 Sim. 635.

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In re GENERAL ROLLING STOCK COMPANY.

CHAPMAN'S CASE.

Company—Winding up—Servant—Salary—Notice of Discharge.

An order for the winding up of a company is notice of discharge to the servants of the company.

Servants of a company ordered to be wound up are not entitled to payment in full, in priority to other creditors, of any part of the wages or salary due to them at the date of the winding up.

THIS was an adjourned summons in the winding up of *The General Rolling Stock Company, Limited,* for payment in full to *John Chapman,* who had been a clerk in the employment of the company at a yearly salary of £50, of three months' salary due to him before the winding-up order, with liberty to prove for the rest of his salary, including three months' salary in lieu of notice of discharge.

The salary of the Applicant had been paid up to Michaelmas, 1864. The winding-up order was made in February, 1865.

Mr. *Phear,* for the Applicant:—

The position of a servant or clerk of a company ordered to be wound up is analogous to that of a servant or clerk of a bankrupt, and the Court may reasonably extend to the former the privilege given to the latter by the 168th section of the *Bankrupt Law Consolidation Act,* 1849 (12 & 13 Vict. c. 106), which enables the Court to order immediate payment in full of three months' wages or salary due at the time of the bankruptcy.

He also referred to the *Companies Act,* 1862 (25 & 26 Vict. c. 89), s. 98.

Lord Romilly, M.R.:—

The express enactment in the case of bankruptcy shews that without such enactment the Court would have had no power to order payment in full of any part of the wages or salary, and in the absence of any corresponding provision in the *Companies Act,* 1862, I cannot, however willing to do so, put the Applicant on a different footing from other creditors of the company.

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Mr. *Wickens* (Mr. *Southgate*, Q.C., with him), for the official liquidator:—

This application also raises the question to what notice of discharge the Applicant was entitled. Official liquidators have great difficulty in giving actual notice to every clerk or servant of a company, and it has been the practice in Chambers to treat the winding-up order as equivalent to notice, but there has been no judicial decision upon the point.

LORD ROMILLY, M.R.:—

The winding-up order, which is advertised in the newspapers, is notice to all the world of the winding up. The Applicant will be entitled to prove for his salary on the footing of having had notice of discharge on the day the order was made.

Solicitors for the Applicant: Messrs. *Masterman & Co.*

Solicitors for the official liquidator: Messrs. *Davidson, Carr, & Bannister.*

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M. R. 1865 *Dec.* 18.

Assets—Marshalling—Vendor's lien—Legatee—Devisee of purchased Estate.

Pecuniary legatees are entitled to stand in the place of the vendor against an estate purchased and devised by the testator, the purchase-money for which is paid after the testator's death out of his personal estate.

Wythe v. *Henniker* (1), not followed.

THIS was the hearing on further consideration of a suit for the administration of the estate of *Thomas Atherton*, Lord *Lilford*.

The testator by his will, dated in 1841, devised all the manors and hereditaments of or to which he was seised or entitled in fee simple, to the use of the Plaintiff for life, with remainder to the first and every other son of the Plaintiff successively in tail, with remainders over. He also gave certain pecuniary legacies.

After the date of his will the testator agreed to purchase an estate, but died before the purchase could be completed.

(1) 2 My. & K. 635.

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By the decree on the hearing in January, 1862, it was declared that the contract was binding on the testator's estate, and that the estate which he had agreed to purchase passed by the above devise.

The testator's personal estate had been exhausted in payment of the purchase-money, and the only question now raised was, whether the pecuniary legatees were entitled to have their legacies paid out of the purchased estate.

Mr. *Hobhouse*, Q.C., for the Plaintiff:—

The claim of the legatees is based upon two principles, viz., 1st, that since the *Wills Act* real estate comprised in a residuary devise is applicable in priority to pecuniary legacies for the payment of the testator's debts, on the ground that a residuary devise is no longer specific: *Dady* v. *Hartridge* (1) and *Rotheram* v. *Rotheram* (2). 2ndly, that pecuniary legatees have the same right of marshalling against the devisee of an estate, which is subject to a vendor's lien, as against the devisee of a mortgaged estate.

As to the first point, however, there is a direct conflict of authority, Vice-Chancellor *Stuart* having decided in *Eddels* v. *Johnson* (3) and *Pearmain* v. *Twiss* (4), in accordance with the dictum in *Emuss* v. *Smith* (5), that every devise is specific, notwithstanding the *Wills Act*.

[The MASTER OF THE ROLLS:—If the question is to be decided upon that point, I must reconsider the matter.]

On the second point, *Wythe* v. *Henniker* (6) is a direct authority against the legatees, though it must be admitted that there is a difficulty in reconciling that case with *Sproule* v. *Prior* (7) and *Birds* v. *Askey* (8).

He also referred to *Tomb* v. *Roch* (9).

Mr. *Whitbread*, for the devisees in remainder.

(1) 1 Dr. & Sm. 236.
(2) 26 Beav. 465.
(3) 1 Giff. 22.
(4) 2 Giff. 130.
(5) 2 De G. & Sm. 722, 735.
(6) 2 My. & K. 635.
(7) 8 Sim. 189.
(8) 24 Beav. 618.
(9) 2 Coll. 490.

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Mr. *Selwyn*, Q.C., and Mr. *Cotton*, for the legatees, were not called upon.

SIR JOHN ROMILLY, M.R. :—

I was of opinion in *Birds* v. *Askey* that, in respect of the legatee's right of marshalling, the distinction between a lien and a mortgage is untenable, and I am still of that opinion. The legatees are entitled to stand in the place of the vendor in respect of his lien against the estate which the testator agreed to purchase.

Solicitors for all parties: Messrs. *Frere, Cholmeley, & Forster.*

M. R. 1865 Nov. 17, 18. Dec. 7.

SCHOTSMANS *v.* LANCASHIRE & YORKSHIRE RAILWAY COMPANY.

Stoppage in transitu—Delivery—General Ship—Bill of Lading—Insolvency, Evidence of—Damages—Sir H. Cairns's Act (21 & 22 *Vict. c.* 27, *s.* 5).

Goods were shipped by the vendor on board of a general ship, belonging to a firm of which the purchaser was a member, and registered in the purchaser's name.

Three parts of the bill of lading (by which the goods were deliverable at *Goole* to the purchaser or assigns) were handed to the vendor, and the fourth part retained by the master :—

Held, that the delivery on board was not delivery to the purchaser, so as to preclude stoppage *in transitu* before the delivery of the goods at *Goole*.

The goods having been delivered into a warehouse to the purchaser's order, after the dishonour of a bill by the purchaser, and after notice to the master and the warehousemen of the stoppage *in transitu*, and some of the goods having since been parted with :—

Held, that damages were recoverable in respect thereof under Sir *H. Cairns's* Act.

THE Plaintiffs in this case were *Emile Schotsmans*, a merchant at *Lille*, in *France*, and *George Gwyn Craig*, his agent in *England*. The Defendants were the *Lancashire and Yorkshire Railway Company*, *James Cunliffe*, and *H. W. Banner*, the assignee in bankruptcy of *James Cunliffe*. *James Cunliffe* had for some time carried on business at *Goole*, in *Yorkshire*, under the name of "*James Fort & Co.*"

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In July, 1864, the Plaintiff *Schotsmans* entered into a contract with *James Fort & Co.* to sell to them 1870 sacks of wheat flour, and directed Messrs. *Delafosse*, of *Rouen*, as his agents and on his behalf, to purchase and ship the same. This they accordingly did, and shipped the flour shortly before the 28th of September, 1864, on board the screw steamer "Londos," bound from *Rouen* to *Goole*, of which *Thomas Woodhead* was master, who, on the 28th of September, signed four bills of lading for the flour, one of which he retained, and the other three of which he handed back to Messrs. *Delafosse*, and which were to the following effect:—

"Shipped in good order, and well conditioned, by *Frères Delafosse*, in and upon the good "Londos" steamship, whereof *T. Woodhead* is master for this present voyage, now lying in the river *Seine*, and bound for *Goole*, 1870 sacks wheat flour; together gross 297,330 kilogrammes, being marked and numbered as in the margin; and are to be delivered in the like order and condition at the aforesaid port of *Goole*, all and every the dangers and accidents of seas and navigation of what nature and kind soever excepted, unto Messrs. *James Fort & Co.*, or assigns, he or they paying freight for the same at and after the rate of, as per agreement. In witness," &c.

The ship "Londos" was advertised as a general trading ship, belonging to Messrs. *Watson, Cunliffe, & Co.*, of which firm the Defendant, *Cunliffe*, was a member. The ship was registered in the name of *Cunliffe*, subject to several mortgages.

On the 30th of September, 1864, Messrs. *Delafosse*, in consequence, as the Plaintiffs alleged, of reports reaching them that *James Fort & Co.* were in embarrassed circumstances, endorsed one of the three bills of lading delivered to them, as follows:—

"Don't deliver to Messrs. *J. Fort & Co.*, but only to *Emile Schotsmans*, or to his order.

"(Signed) FRÈRES DELAFOSSE."

This was forwarded to *Schotsmans*, and endorsed by him to *Craig*, his agent.

On the 3rd of October, a bill of exchange in the hands of *Schotsmans*, accepted by *James Fort & Co.*, for £1000 fell due, and on being presented for payment was dishonoured; and on the 6th

of October another bill for a larger amount, accepted by *James Fort & Co.*, was also dishonoured.

On the 3rd of October, 1864, the vessel arrived in the river *Humber*, and *Craig* served a notice on the master of the ship that *Schotsmans* was owner of the flour, and discharged him from delivering the same to *J. Fort & Co.*, or any other person, without *Schotsmans's* order. He also served a notice on the agent of the *Lancashire and Yorkshire Railway Company* to warehouse the flour to his order. He also served another notice upon the master of the ship, declaring that he stopped the flour *in transitu*, and requiring its delivery; and made other ineffectual attempts to secure it, but the flour was, notwithstanding the Plaintiffs' protest, received into the warehouses of the *Lancashire and Yorkshire Railway Company*, to the order of *J. Fort & Co.*, and a considerable portion of it was afterwards removed.

The Plaintiffs alleged that the flour was discharged from the ship by force and fraud, and received by the company after it was effectually stopped *in transitu* by the Plaintiff *Schotsmans*, and after he had obtained a valid lien thereon for the payment of the purchase-money.

On the 11th of October, *J. Fort & Co.* were adjudicated bankrupts, and the Defendant *Banner* was afterwards appointed creditors' assignee.

The bill prayed, 1st, that the Plaintiffs, or the Plaintiff *Schotsmans*, might be declared entitled to have the flour delivered up to them or him, or that, if not so entitled, the Plaintiff *Schotsmans* might be declared entitled to a lien on the flour for the payment of the purchase-money; 2ndly, that in the meantime the Defendants might be restrained by injunction from removing or parting with the flour; that if any part of the flour had been removed out of the control of the Defendants, directions might be given for assessing the damages in consequence thereof; and that the Defendants might be decreed to pay the same.

The Defendants the *Lancashire and Yorkshire Railway Company*, by their answer, submitted to the judgment of the Court whether the flour, or any part thereof, was removed after it had been effectually stopped *in transitu*, or after the Plaintiff *Schotsmans* had obtained a valid lien thereon.

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The answer of the Defendant *Cunliffe* contained the following admission:—"I admit that the said Messrs. *Delafosse* did, on the 28th of September, 1864, ship 1870 sacks of flour on board a steamer called the "Londos," and that the said "Londos" was then bound from *Rouen* to *Goole*, and that she was trading, and was advertised to be trading, between those ports, and that she brought over from *Rouen* to *Goole* a general cargo, and that Messrs. *Watson, Cunliffe, & Co.* were the agents and consignees of the ship."

The Defendant *H. W. Banner*, in his answer, stated:—"I have been informed, and I believe, that when the sacks of wheat flour in the bill referred to were shipped at *Rouen*, on board the "Londos," the said ship belonged, subject to certain mortgages thereon, exclusively to the Defendant *James Cunliffe*, and was registered in his name, and that he was in possession of the said ship by the master thereof, who was his agent, and I humbly submit whether, under the circumstances aforesaid, the *transitus* of the said sacks of wheat flour did not end when the said sacks were shipped at *Rouen*, as aforesaid; and whether all the subsequent proceedings and attempts on behalf of the Plaintiffs to stop the delivery of the said sacks of wheat flour were not too late, and invalid, and of no effect at law or in equity, and whether the proceeds of the said wheat flour do not belong to me as assignee of the said *James Cunliffe*."

By an interim order the Defendants had been restrained from selling the flour: it had been sold by a subsequent order, and the money paid into Court.

Mr. *Baggallay*, Q.C., Mr. *Eddis*, and Mr. *Butt*, for the Plaintiffs:—

The delivery of the flour at *Rouen*, on board the "Londos," was not such as to deprive the vendor of his right to stop *in transitu*. The evidence shews that the "Londos" was a general ship. The case comes within the principle of *Mitchel* v. *Ede* (1). In that case, the consignor had shipped goods at *Jamaica*, on board a general ship belonging to the Defendants, who were merchants in *London*, to whom he was indebted in more than their value, and the captain had signed and handed to the consignor a bill of lading making the goods deliverable to the Defendants; on which the consignor

(1) 11 A. & E. 888.

indorsed that the goods were to be delivered to the Defendants only on condition of security being given for certain payments; otherwise, they were to be delivered to the Plaintiff's agent. The bill of lading was then indorsed and delivered to the Plaintiff, to whom the consignor was indebted in more than the value of the goods: it was there held that the fact of the delivery on board a ship with a general cargo did not deprive the consignor of his property in the goods merely because the ship belonged to the Defendants. That case also decided that the consignor did not lose his property in the goods, by reason of his having accepted one of the bills of lading. It does not follow that because goods are at the risk of the vendee, they are so delivered to him as to preclude the vendor from stopping *in transitu*: *Van Casteel* v. *Booker* (1); *Turner* v. *Liverpool Docks* (2). When goods are sold by one person to another, and no stipulation is made as to the time of payment, the property of the goods passes to the vendee; but the vendor has the right to retain them till he is paid. When goods are sold on credit, and remain in the possession of the vendor, the property passes to the vendee, and the right of possession, but subject to the lien of the vendor if they remain in his possession. When a vendor has parted with possession, he may, notwithstanding, have a right to stop the goods *in transitu*: *Smith's* Leading Cases (3). In *Heinekey* v. *Earle* (4), which was a mixed case of stoppage *in transitu* and acceptance of goods by the vendee, the delivery of the bill of lading to the consignee was held not to deprive the vendor of his right. In many cases, the question whether there was really a delivery of the goods, has been held to depend very much on the intention of the vendor. In this case, the intention may be inferred from the fact, that about the time of shipment, the vendor was aware that *Fort & Co.* were at least in embarrassed circumstances, that two days after shipment, he intended to alter the destination of the goods, and from the form of the bill of lading: *Lickbarrow* v. *Mason* (5). From all these circumstances the conclusion is, that *Fort & Co.* did not acquire possession of the flour, and that the Plaintiff's right of stoppage *in transitu* was not stopped.

(1) 2 Ex. 691. (2) 6 Ex. 543. (3) 4th ed. p. 643.
(4) 8 E. & B. 410, 422. (5) 5 T. R. 683.

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Mr. *Jessel*, Q.C., and Mr. *Bird*, for the railway company :—

The vendor had no right to stop the goods *in transitu*. There was no proof of a contract for sale, or of *Cunliffe's* insolvency at the time of the delivery. A mere apprehension of insolvency on the part of the vendor—though it may be afterwards confirmed—is not sufficient to justify a stoppage *in transitu*. The real question is as to the fact of delivery. In the argument of Sir *J. Campbell*, in *Mitchel* v. *Ede* (1), which we adopt for the present Defendants, it is put thus: "The bill of lading being made out to the Defendants, would, if delivered to them or any of them, or to any one for them, as the master, certainly have transferred the property to them according to its terms. The bill of lading never was in their possession, which excludes a virtual as well as an actual delivery." That was not a case between vendor and purchaser. The law on this subject is stated in *Chitty* on Contracts (2). The result of the cases is this, that you must shew that the vendor intends to part with the goods and to deliver them to the vendee, and if the vendee has the right to take possession, either by himself or by his agent, then the delivery is complete. The retention of the bill of lading, in the present case, by the master of the ship, who was agent for the consignee of the goods, constituted a complete delivery; it was absolute and irrevocable, and the vendor could not alter their destination. If Mr. *Cunliffe* had gone over to *Rouen*, himself, and received the flour, its destination could not then have been impeached by the vendor; or if he had purchased the flour of a miller in *England*, and had sent his cart for it, and it had been brought away in his cart, would not that have been an absolute delivery of the flour? In that case he would have received the flour in his own cart: here he received it in his own ship. It could not be contended that the vendor could have followed the flour in the cart, so neither could he follow it on board the ship, or attach it in any way. In *Ogle* v. *Atkinson* (3), which was in most respects identical with the present case, the delivery of the flour was held to be irrevocable. The same principle was recognised in *Fowler* v. *McTaggart*, cited in *Bohtlingk* v. *Inglis* (4). It must be admitted that the "Londos"

(1) 11 A. & E. 888.
(2) 7th ed. pp. 390, 393.
(3) 5 Taunt. 759.
(4) 3 East. 381, 390.

was a general ship, but *Cunliffe* was not the less its owner, and it was a ship for the conveyance of his own goods, as well as of others; but the carriage of the goods could not affect this transaction. If a carrier purchased flour from a miller, and sent his carrier's cart to fetch it away, that would not prevent its being a complete delivery. As to the effect of a bill of lading, we refer to 18 & 19 Vict. c. 111, s. 3; 16 & 17 Vict. c. 107, s. 53.

On the question of the Plaintiff's right to damages as against the railway company, the Court has no jurisdiction to grant that part of the relief sought for by the bill. The flour having been parted with before the bill was filed, it is not a case to which s. 5 of the 21 & 22 Vict. c. 27 (Sir *Hugh Cairns's* Act), would apply. When there was no jurisdiction before the Act, no damages can be awarded under the Act: *Rogers* v. *Challis* (1).

Mr. *Selwyn*, Q.C., and Mr. *Lindley*, for the assignee in bankruptcy of *Cunliffe*:—

When goods are delivered to any carrier on behalf of the purchaser, then the delivery is complete: *Dutton* v. *Solomonson* (2). The stipulation that goods are to be delivered at a particular place, gives the purchaser no better right than he would otherwise have had: *Fragano* v. *Long* (3). The delivery of goods on board a vendee's own ship is a delivery to himself, unless the vendor protects himself by special terms restraining such delivery: *Selwyn's* N.P. (4). The question is—Is the vendor protected by any special circumstances? It is said that his right is maintained by his holding three of the bills of lading, by the fact that the flour was to be delivered at *Goole*, and by the ship being a general ship. The retention by the master of the bill of lading is immaterial: *Turner* v. *Liverpool Docks* (5). The delivery at *Goole* was for *Cunliffe's* own benefit, and cannot affect the validity of the delivery at *Rouen*, for when goods are to be delivered to the consignee it cannot matter where that delivery takes place: *London and North-Western Railway Company* v. *Bartlett* (6). With regard to the character of the ship as a general ship, we rely on the argument of

(1) 27 Beav. 175.
(2) 3 B. & P. 582.
(3) 4 B. & C. 219.
(4) Pp. 1288—1292.
(5) 6 Ex. 543.
(6) 7 H. & N. 400.

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the counsel for the railway company. In *Mitchel* v. *Ele*, relied on by the Plaintiffs, there was no contract for sale at all. In a somewhat similar case, in the American Courts, *Bolin* v. *Huffnagle* (1), it was held that if goods are shipped on credit in a foreign port, on board the consignee's own ship, the master of which signs a bill of lading by which they are to be delivered to his owner, the *transitus* is at an end by delivery to the master, and the consignor cannot afterwards stop the goods in case of the insolvency of the consignee before their arrival. In the present case the contract being admitted, the delivery complete, and the goods at the consignee's risk, the right to stop *in transitu* was at end. The cases of *Lucas* v. *Nockells* (2), and *Whitehead* v. *Anderson* (3), shew what is necessary to constitute a valid stoppage *in transitu*, and what possession by the consignee is sufficient to defeat it.

SIR JOHN ROMILLY, M.R. :—

The general view I take of the case is this. I think the principle of these cases is not much in dispute; but the difficulty generally arises on a question of fact. I apprehend it will not be disputed on either side that in every case where there is a contract for the sale of goods between a vendor and a vendee, the property in the goods passes to the vendee, subject to the right of stoppage *in transitu* before actual or virtual delivery. The only question really is, whether there was an actual or virtual delivery of the goods when they were put on board the ship at *Rouen*, because if there was, the right to stop *in transitu* was at an end. If not, there was a stoppage *in transitu* on the morning before they were delivered, by notice given by *Craig*.

It appears to me that a proposition has been stated on behalf of the Defendants which will not be disputed by anybody, that if the vendee of the goods sends his own ship for the goods, and they are delivered on board that ship, that is an actual delivery of the goods to the vendee, and the right to stop *in transitu* is gone. That I consider to be practically the decision in the case of *Ogle* v. *Atkinson* (4); and there may also be an actual delivery, although the ship is not the ship of the vendee. For instance, if the pur-

(1) 1 Rawle, 1.
(2) 2 Y. & J. 304.
(3) 9 M. & W. 518.
(4) 5 Taunt. 759.

chaser of the goods sends over an agent on his behalf to receive the goods for him, and they are delivered to him in his character of agent for the purchaser, then there is an actual delivery of the goods, and the right to stop *in transitu* is at an end. Now a very material question in this case is this, whether, in the absence of special circumstances a delivery on board a general ship belonging to the vendee is delivery to him. In the case of *Ogle* v. *Atkinson* (1), the purchaser of the goods expressly sent his own ship for those goods, and the captain was sent as agent of the purchaser to receive the goods. The Court in that case held that as soon as the goods were put on board that ship they were actually delivered to the captain as the purchaser's agent. It is true he afterwards took in other goods, but the ship was sent expressly for the purpose of receiving those goods, and consequently it was analogous to the case which Mr. *Bird* put to me, of the carrier being the purchaser of the goods, and sending one of his ordinary carrier waggons to receive them, in which case no one could doubt the delivery would be perfect, and the right to stop *in transitu* would be at an end.

But if the ship is a general ship, then I apprehend the case of *Mitchel* v. *Ede* (2) determines that the ship stands expressly in the same situation as the common carrier; and the mere fact that the ship which is used as a common carrier is the property of the vendee does not make the mere placing of the goods on board a delivery to the owner of the ship. That in my opinion is what is determined in *Mitchel* v. *Ede* (2), and that is the important part of the decision with reference to the case at present before me. I admit also this, which is a very material part of the Defendant's case, that although there may be no actual delivery, yet there may be a virtual delivery, which would amount to the same thing. If the bills of lading had been sent to *Fort & Co.*, that is, to Mr. *Cunliffe*, then I apprehend the right of stoppage *in transitu* would have been at an end as soon as he got the bills of lading. So also if delivered to his agent on board the vessel. But I do not think that the evidence here amounts to such a case.

In this case, what occurred was this: When the goods were put on board the vessel, the captain signed four bills of lading, and

(1) 5 Taunt. 759. (2) 11 A. & E. 888.

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delivered three of them to Messrs. *Delafosse & Co.* as the shippers, and retained one himself. This is very material, because, assuming that if Messrs. *Delafosse & Co.* had delivered all the bills of lading to the captain, that would have put an end to the right of stoppage *in transitu*, and made the virtual delivery of the goods to *Cunliffe* or the agent of *Cunliffe*; I am of opinion that the mere retention by the captain of one of those bills of lading cannot be treated in the same way unless they were so retained by him under an express arrangement between them that that should be the effect of the transaction.

I think there is an analogy between the case of *Mitchel* v. *Ede* (1) and the present case, though it is liable to the distinction which Mr. *Selwyn* and Mr. *Lindley* have pointed out, and which Mr. *Jessel* enlarged upon very much, that it was not a case of vendor and purchaser, yet in that case the captain had signed the bill of lading and had delivered it to the shipper.

This is the general view I take of the case. It is very important to observe, and yet it should always be borne in mind, that there is a distinction between Mr. *Cunliffe* or Messrs. *James Fort & Company* (whichever name you choose to call him by), and Messrs. *Watson, Cunliffe, & Company.* They are two distinct sets of persons. It is very true that Mr. *Cunliffe* was (if I may use a species of anomalous expression), the sole partner in one firm, and that he was partner with another person in the other firm. But they are totally separate and distinct characters; and in Courts of law we have constantly to deal with that circumstance. One man frequently unites, in his own person, different characters. He may be a consignee and executor, but what he does, as an executor, does not affect what he does as a consignee. This vessel was a vessel that was only advertised as a trading vessel between *Goole* and *Rouen*, by Messrs. *Watson, Cunliffe, & Company*, for the common carriage of goods, and, therefore, it appears to me that this was not a vessel sent by *Cunliffe* for the reception of these goods, but that it was a mere common carrier. This is admitted in *Cunliffe's* answer.

I admit that if *Cunliffe*, hearing that this flour had been purchased for him, had sent this ship expressly for the purpose of

(1) 11 A. & E. 888.

taking that flour, and the captain for the purpose of receiving the flour, and had so informed Messrs. *Delafosse & Company*, though he had taken in other goods, and another cargo, then it would have come within the case of *Ogle* v. *Atkinson* (1), and there would have been an actual delivery the moment they were put on board the vessel. But the vessel being a general ship, I am of opinion, that unless the goods were intended to be delivered to some express agent of the vendee, there was no delivery by putting them on board the ship. Putting them on board the ship was nothing more than putting them within the control of the captain of the ship, and the fact that the captain was appointed by a firm of which *Cunliffe* was a member, does not make him any more the agent for the receipt of these goods, than if any other person had appointed him. It is all involved in the question, whether the ship was a ship trading generally, or was specially sent for the express purpose of receiving these goods. If it was not, the delivery of them on board the ship was only delivering them to the captain, who has the control of the ship, and he is only agent for the owner for the general purposes of the ship, and not for the express purpose of receiving these goods, unless he has been expressly so deputed for that purpose as his agent.

Then I have admitted, that if the bills of lading were delivered to him, as the agent of the vendee, for the purpose of transferring the property, there would be a virtual delivery, and that would put an end to the right of stoppage *in transitu;* but although the evidence is meagre on that subject, I think it does not amount to that. The evidence is this:—The master, on the 28th of September, signed four bills of lading of the flour, one of which he retained in his own custody, and the other three of which he handed back to Messrs. *Delafosse.* It has been urged, that, considering the meagre character of the evidence, I should presume everything that is not proved against the Plaintiff; but I am not of that opinion. It is for the Defendants to prove that the delivery of the bill of lading to the captain was delivery to *Cunliffe.*

On the other points of the case I am also in the Plaintiffs' favour. I am of opinion that the insolvency of *Cunliffe* is duly proved. A bill drawn by him is proved to have been dis-

(1) 5 Taunt. 759.

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honoured on the day on which the ship came to *Hull*. Two or three days after, another of his bills was dishonoured; and five days later he was declared bankrupt. It is sufficient for the purpose of stoppage *in transitu* to shew that the vendee was in such circumstances as not to be able to meet his engagements. I am of opinion that this was the case with Mr. *Cunliffe*, and that there was a complete right of stoppage *in transitu*.

I am also of opinion that, if the railway company had not parted with the flour before the bill was filed, the Plaintiffs would be entitled to an injunction, and that the fact of their having parted with it after notice, makes it one of those cases which Sir *Hugh Cairns's* Act is intended to meet.

Dec. 7. SIR J. ROMILLY, M.R.:—

In this case, I have again carefully examined and considered all the cases cited to me, and the evidence, and I am confirmed in the view which I expressed at the close of the argument. I am of opinion that there was no complete delivery at *Rouen*, on board the "Londos," to the consignee, and that the stoppage *in transitu* in the *Humber* was sufficient and complete before the goods were delivered there. Therefore I am of opinion that the Plaintiff is entitled to a decree, subject to the payment of freight and customs' duty, and to a lien for the unpaid purchase-money.

MINUTES:—Declare that the Plaintiff, *E. Schotsmans*, is entitled to a lien for unpaid purchase-money, and for his costs of this suit, upon the cargo of flour in the bill mentioned, or the produce thereof, subject to freight, customs' duty, and landing charges. Order inquiry as to amount of unpaid purchase-money, and what is due in respect thereof; and inquiry what has become of the cargo of flour, and if any part thereof has been sold, dealt with, or disposed of otherwise than pursuant to the order of this Court; and what has become thereof, and what it has produced, and by whom the proceeds have been received; and if not sold, what is the value thereof. Further consideration adjourned. Liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Pritchard & Sons.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland;* Mr. *T. Horrex;* and Messrs. *Williamson, Hill, & Co.*

JENNER *v.* JENNER.

V.-C. W.
1866
Jan. 17, 19.

Deed—Construction—General words—Jurisdiction—Rolt's Act, 25 & 26 Vict. c. 42.

A marriage settlement recited that by virtue of certain specified instruments, certain specified hereditaments, "and all other the freehold hereditaments in the county of *York* thereinafter expressed to be appointed and released," were limited as the settlor should appoint, and subject thereto, to him in fee. The settlement then recited that, upon the treaty for the marriage it was agreed that the several hereditaments and estates in the county of *York* "thereinafter mentioned and intended to be thereby conveyed" should be assured to the uses thereinafter mentioned. The deed then contained an appointment and conveyance by the settlor of the specified hereditaments mentioned in the recital, and of "all other the freehold hereditaments, if any, in the county of *York*, of or to which the grantor was seised or entitled for an estate of inheritance."

The settlor, at the date of the conveyance, was seised of a fee simple estate in *Yorkshire*, called the *L.* estate, which was not comprised in the above specified instruments, and was not recited nor mentioned in the conveyance:—

Held, that the general words must be restricted by the recital, and that the *L.* estate did not pass.

On bill filed, praying a declaration that a legal estate did not pass by a settlement, or if it did, that the settlement might be rectified; and the Court being of opinion that the estate did not pass:—

Semble, that the Court had no jurisdiction to declare the legal right, and *held*, that the proper decree was, "The Court being of opinion that the estate did not pass, dismiss the bill without costs."

THE question in this suit was, whether by a deed of settlement certain lands, not specified or otherwise mentioned or referred to in the deed, passed under general words.

By indentures of lease and release, dated the 15th and 16th of August, 1823, a tenth and all other shares in the navigation of the *Aire* and *Calder* rivers, in the county of *York*, with appurtenances thereto, which were partly freehold and partly copyhold, all which had been devised by the will of one *Peter Birt*, were assured to the use of *Robert Jenner* for ninety-nine years, if he should so long live, with remainder to the use of his first and other sons in tail general and remainders over.

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At the date of the above settlement, *Robert Jenner* was seised in fee of the property, the subject of the present suit, which was partly freehold and partly copyhold, situate in the county of *York*, called the *Lofthouse Gate Estate*. This was not included in the will of *Peter Birt*, nor in the settlement of 1823.

In March, 1824, *Robert Jenner* died intestate, and the *Lofthouse Gate Estate* descended to his heir-at-law and customary heir, *Robert Francis Jenner*.

By indentures of lease and release, dated the 21st and 22nd of May, 1824, *Robert Francis Jenner* conveyed to *J. P. Winter* and his heirs, to the intent that he should become tenant to the *præcipe*, the above-mentioned navigation shares and their appurtenant hereditaments, and "all other the freehold messuages, lands, and hereditaments comprised in, or intended to be conveyed by," the indentures of the 15th and 16th August, 1823, "and which are situate and being in the said county of *York*;" and the uses of the recovery were declared to such person or persons as *Robert Francis Jenner* should by deed appoint, and in default thereof and subject thereto, to *Robert Francis Jenner* in fee, subject to uses to bar dower.

A recovery was afterwards duly suffered, in which *Robert Francis Jenner* was vouchee.

The marriage settlement under which the present question arose consisted of deeds of lease and release, dated respectively the 8th and 9th of August, 1824. The release recited that, by virtue of the will of *Peter Birt*, the indentures of the 15th and 16th of August, 1823, the indentures of the 21st and 22nd of May, 1824, and the recovery, the tenth and all other the *Aire and Calder* navigation shares, and the hereditaments belonging thereto, "and all other the freehold hereditaments in the county of *York* hereinafter expressed to be appointed and released," were limited to such uses as *Robert Francis Jenner* should appoint, and in default of appointment, and subject thereto, as above mentioned.

It also recited the intended marriage, and that upon the treaty for the same, *Robert Francis Jenner* had agreed and proposed that "the several hereditaments and estates in the county of *York* hereinafter mentioned and intended to be hereby conveyed," and

the inheritance thereof, should be conveyed and assured as hereinafter mentioned.

The deed then contained an appointment and conveyance by *Robert Francis Jenner* to the trustees, of the navigation shares, and the hereditaments belonging or appertaining thereto; and proceeded as follows: "And all other the freehold hereditaments, if any, in the county of *York*, of or to which the said *Robert Francis Jenner* is now seised or entitled at law or in equity, for an estate of freehold or inheritance in possession, reversion, or remainder, and the reversion and reversions, remainder or remainders, yearly, and other rents, issues, and profits thereof, and of every part thereof. And all the estate," &c.

The deed contained no mention whatever of the *Lofthouse Gate Estate*, and the question was whether it passed under the above general words.

In November, 1861, the devisees in trust of the residuary real estate of *Robert Francis Jenner* offered the *Lofthouse Gate Estate* for sale, and the governors of a charity were the purchasers. The Court sanctioned the purchase, subject to a good title being made; and upon inquiry, this question arising, a suit became necessary.

The bill was filed by the vendors and the purchasers against the persons interested under the settlement of 1824, one of whom was an infant, praying for a declaration that the *Lofthouse Gate Estate* was not included in or affected by the indentures of the 8th and 9th of August, 1824, and that, if necessary, the indentures might be rectified.

Mr. *E. E. Kay* (Mr. *Rolt*, Q.C., with him) for the Plaintiffs:—

The cases establish the following rule, that where you have a sweeping clause of general words, following a particular description of property, in a deed, it by no means follows that the general words will pass other property than that which is particularly described: *Anon.* (1); *S. C. Moore* v. *Magrath* (2); *Walsh* v. *Trevannion* (3); *Gray* v. *The Earl of Limerick* (4); *Rooke* v. *Lord Kensington* (5); *Hopkinson* v. *Lusk* (6).

(1) Lofft, 398.
(2) 1 Cowp. 9.
(3) 15 Q. B. 733.
(4) 2 De G. & Sm. 370.
(5) 2 K. & J. 753.
(6) 12 W. R. 392.

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Mr. *E. R. Turner*, for the Defendants:—

The point is decided in an old case of *Hagget* v. *Giles* (1), on the ground that, unless the estate of the grantor, other than that recited in the deed, passes by the general words, there is nothing upon which the general words can have operation.

The report of the case of *Moore* v. *Magrath*, as given in *Cowper*, does not go the length of the report in *Lofft;* and all that case shews is that you must look to the intention of the parties. Here there is nothing in the recital inconsistent with the intention of passing the *Lofthouse Gate Estate.*

The following cases were also cited: *Ringer* v. *Cann* (2); *The Marquis of Exeter* v. *The Marchioness of Exeter* (3); *Lewis* v. *Duncombe* (4).

The VICE-CHANCELLOR asked, in the event of his holding no rectification of the settlement to be requisite, what jurisdiction he had to make any order, except to dismiss the bill.

Mr. *Kay* referred to *Rolt's* Act, 25 & 26 Vict. c. 42, and said that the prior adjudication was requisite in order to bring the Court to the conclusion whether it was necessary to rectify the settlement or not.

SIR W. PAGE WOOD, V.C.:—

This case raises the question as to whether certain property, which purported to be dealt with by the will of Mr. *Jenner*, called the *Lofthouse Gate Estate*, passed under general words in a marriage settlement, or whether the Court must come to the opposite conclusion that these words are inadequate to pass the estate, and that it consequently formed part of the residue.

I had to consider the whole of this subject in the case of *Rooke* v. *Lord Kensington* (5), and I am quite satisfied, after having heard the able argument of Mr. *Turner*, even upon the authorities he has cited, that, where there is a manifest discrepancy between the recital and the conveyance, the recital being clear as to what

(1) 2 Roll. Abr. Graunts (P) 2, p. 49, l. 45.
(2) 3 M. & W. 343.
(3) 3 M. & Cr. 321.
(4) 29 Beav. 175.
(5) 2 K. & J. 753.

was intended to be conveyed, and the conveyance going beyond the recital, the conveyance will have to be restricted.

No doubt that rule has more frequently been held to apply to the case of releases than of any other deed; but that does not arise from any difference in principle, but simply because the inconsistency is found in releases more frequently than in other deeds.

The first case referred to was one in which the principle was acted upon very strongly by Lord *Mansfield*, viz., *Moore* v. *Magrath* (1), and, whether or not it was carried further in that case than it has been by Courts of law in general, it certainly was distinctly recognised by the Court of Exchequer in *Ringer* v. *Cann* (2), referring to a former case of *Payler* v. *Homersham* (3), before Lord *Ellenborough*.

In that case of *Payler* v. *Homersham*, the subject matter was a release, and it was argued very strenuously that a release in general terms must operate to extend to future claims, although the foregoing recital was limited to claims then in existence, and it was stated that Lord *Holt*, in *Knight* v. *Cole* (4), had denied the case cited by *Tanfield* (5), which recognises the general doctrine that words in a recital may restrain the general operation of a deed, to be good law; upon which Lord *Ellenborough* observes:—"I do not find that Lord *Holt*, when he denied the authority of the case from *Rolle's* Abr., denied also the position of *Gregory*, J., that the general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument truly, you must have regard to all its parts, and more especially to the particular words of it. I am sorry, therefore, to find that the case cited from Lord *Rolle* was said not to be law, because it seems to me as sound a case as can be stated."

In the other case from *Rolle*, which has been cited by Mr. *Turner*, the grantor pointed out the object which he had in view—a circumstance which does not occur in this case—namely, to pass "all his lands, houses, and edifices in *D.*;" and he having nothing in *D.* but

(1) 1 Cowp. 9.
(2) 3 M. & W. 343.
(3) 4 M. & S. 423.
(4) 1 Show. 150.
(5) 2 Roll. Abr. Limitation (A) 3, p. 409, l. 43.

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the reversion of eight leases, and the deed having recited only seven, it was held that the reversion of the eighth tenement passed under the general words, otherwise there would be nothing left for the words to operate upon.

In the case which was cited of *Ringer* v. *Cann* (1), a similar decision was come to, because it appeared to the learned Judge that the obvious intention was to pass all that the assignor possessed. Upon the rule being argued, Baron *Parke*, now Lord *Wensleydale*, says:—"I entirely agree with my Lord Chief Baron in thinking that the learned Judge was right in saying that, in his opinion, the leasehold estate did pass under the words of this deed. The case turns upon the question whether the estate passes or not under the general terms used in the assignment. Now, let us look to the object of the parties. In *Doe* v. *Meyrick* (2) the object of the parties was to pass only a particular estate, and the general words were restricted to meet the obvious intention of the parties. But that is not the case here: here the object of the parties is to carry everything valuable."

In the case of *Alexander* v. *Crosbie* (3), before Lord *St. Leonards*, there was a recital of an intention to exclude the lands of *Ballyhenry* and its sub-denominations, and then there was a conveyance by name of a particular property, which was a sub-denomination of the lands of *Ballyhenry*; and Lord *St. Leonards* said that, where there are two parts of a deed inconsistent with each other, he must take the part where the property is specifically described in preference to that where it is generally described.

The general principle, therefore, is that you must look at the object and intention of the parties. Now, what has happened in the present case is this:—

The *Lofthouse Gate Estate* was not derived from the will of *Peter Birt*, nor was it included in the prior settlement, which comprised only property which formed part of *Peter Birt's* estate. Then *Robert Francis Jenner*, being desirous of barring the estate tail, executes a recovery deed, whereby he conveys the navigation shares and their appurtenances, "and all other the freehold messuages, lands, tenements, and hereditaments comprised in and conveyed or intended to be conveyed by the said indenture of release

(1) 3 M. & W. 343. (2) 2 Cr. & J. 223. (3) Ll. & Goo. 145.

and settlement, and which are situate and being in the said county of *York*," to make a tenant to the *præcipe*; and when he comes to his own marriage settlement, he recites that, by virtue of the will of *Peter Birt*, of the prior settlement, of the recovery deed, and of the recovery, the one-tenth part or share, and all other the shares late of *Peter Birt*, deceased, in the navigation of the rivers *Aire* and *Calder*, and in all the freehold messuages, mills, lands, tenements, and hereditaments belonging thereto, "and all other the freehold hereditaments in the county of *York* hereinafter expressed to be hereby appointed and released," were assured to the use of such persons as *Robert Francis Jenner* should by deed appoint, and in default of appointment, to him in fee. Therefore, what is plain is this, that everything which the settlor is here referring to as being hereby appointed and released, is comprised in the will of *Peter Birt*, in the settlement of 1823, and in the recovery deed; in other words, that no hereditaments of his in the county of *York*, other than those which are comprised in the will of *Peter Birt* and the prior deeds, are to be appointed and released by his marriage settlement.

Then the deed witnesses that, in consideration of the marriage, *Robert Francis Jenner*, in pursuance of the power or authority given or reserved to him by the said indenture of release, thereby limits and appoints that the "tenth part and hereditaments in the county of *York* hereinafter expressed to be hereby released," with their appurtenances, shall thenceforth remain and be upon the uses and trusts thereinafter declared; and then it further witnesses that *Robert Francis Jenner* thereby grants, releases, and confirms the one undivided share and all other the shares in the navigation of the rivers *Aire* and *Calder*, and all the freehold hereditaments purchased or to be purchased under the navigation Acts, and the appurtenances, "and all other the freehold hereditaments, if any, in the county of *York*, of or to which the said *Robert Francis Jenner* is now seised or entitled at law or in equity, for an estate of freehold or inheritance in possession, reversion, or remainder."

Now, it is true that these general words are not expressly limited to the hereditaments which were derived from *Peter Birt's* will, and included in the settlement and recovery deed; but I think the recitals are clearly sufficient to shew that the intention

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was so to limit them. Moreover, of the *Lofthouse Gate Estate* the testator was seised in fee simple, and it is not an appropriate form of conveyance to convey an estate in fee simple by way of appointment, as would be the case if it formed part of the property which was released by the marriage settlement.

Upon the whole, I think it clear in this case that there was no intention to pass the *Lofthouse Gate Estate.*

Then comes the original difficulty, whether I ought to dismiss the bill, or to make a declaration as to the legal title. In *Rooke* v. *Lord Kensington* I dismissed the bill, and I think I must do the same here. No doubt the Act referred to in the argument (1) says that in all cases in which any relief or remedy within the jurisdiction of the Court is or shall be sought in any cause or matter, every question of law or fact, cognisable in a Court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by the same Court. Accordingly, I am obliged to determine the question of law in this case; but it does not follow that, because I must determine the question, and accordingly have now determined it, for the purpose of arriving at the result of whether or not a rectification of the settlement is necessary, I therefore have a right to make a declaration. It is one thing to determine the legal question in order to conclude that a Plaintiff has no relief in equity, and another thing to say the Court has power to declare a legal right.

The order, therefore, which I must make is—The Court being of opinion that the estate called the *Lofthouse Gate Estate* did not pass by the indentures of the 8th and 9th of August, 1824, let the bill be dismissed, but without costs.

Solicitors for the Plaintiff: Messrs. *Scott, Tahourdin, & Co.*
Solicitor for the Defendant: Mr. *Reddish.*

(1) 25 & 26 Vict. c. 42, sec. 1.

MARTIN *v.* MARTIN.

V.-C. W.

1866

Jan. 24.

Maintenance—Contingent Legacy—Interest.

Testator bequeathed to his infant son a legacy of £6000, contingently on his attaining twenty-one. He also bequeathed his residuary real and personal estate on trust till his said son should attain, or if living would have attained, fifteen, for the maintenance and education of all his children, and subject thereto for accumulation at compound interest; the aggregate fund to be in trust for all his children contingently on their attaining twenty-one:—

Held, on the authority of *Chambers* v. *Goldwin* (1), that the infant was entitled to maintenance during the interval between his attaining fifteen and twenty-one; and, the Court selecting that mode of giving maintenance which was most for the benefit of the infant, interest was declared to be payable on the £6000 legacy.

THIS was a special case. *Thomas Martin*, by his will, bequeathed, among various other legacies, to each of his sons, the Defendants, *Horace Martin* and *Edwin Martin*, and the Plaintiff, *Leslie Martin*, a legacy of £6000 "if and as and when they should respectively attain the age of twenty-one years." He further directed his trustees and executors, unless otherwise directed by his will, to pay or retain the several money legacies thereby bequeathed within twelve calendar months next after his decease, or sooner if they should think fit. He also devised and bequeathed unto and to the use of his said trustees the residue of his real and personal estate upon trusts for sale and conversion; and as to the moneys to arise from such sale and conversion, upon trust, in the first place, after payment of trust expenses, debts, and funeral and testamentary expenses, to pay, retain, or set apart and appropriate the pecuniary legacies bequeathed as aforesaid, and to invest the surplus, with power to vary securities; and upon further trust out of the annual income of his said residuary estate, and of the stocks, funds, and securities whereupon the same should be invested as aforesaid, "until his said son, *Leslie Martin*, should attain, or if living would have attained, the age of fifteen years," to permit and empower his said wife, if she should so long live, to receive, or if not, to pay and apply such annual sum as might be sufficient for

(1) 11 Ves. 1.

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the maintenance of his wife and such of his children as should for the time being be under the age of twenty-one, and for the expenses attending the education of his said children, "until his said son, *Leslie Martin,* should attain, or if living would have attained, the age of fifteen years;" and subject, as aforesaid, to accumulate at compound interest the income of his said residuary estate, or of the stocks, funds, and securities whereupon the same should be invested as aforesaid, "until his said son, *Leslie Martin,* should attain, or if living would have attained, the age of twenty-one years;" and as to the aggregate fund, in trust for all or such of his said sons as should attain the age of twenty-one years "when and as and if they should respectively attain that age;" if more than one, in equal shares as tenants in common.

The Plaintiff, *Leslie Martin,* had attained fifteen, but was still under age, and the sole question was—a legacy having been given to him contingently on his attaining twenty-one, and a share of residue also contingently on the same event, whether or not interest was payable on the £6000 legacy.

The two other sons had attained twenty-one, and their legacies had been paid.

Mr. *G. M. Giffard,* Q.C., and Mr. *Walter Charles Renshaw,* for the Plaintiff:—

The proposition admits of no discussion, that where a legacy to a child is contingent, and the time of payment future, if no maintenance in the meantime is directed by the will, interest on the legacy will run from the death of the testator.

The Vice-Chancellor of *England* drew a distinction in the case where maintenance has been directed by the testator up to a certain period and no longer. That he conceived to be evidence of an intention that interest should cease: *Kime* v. *Welfitt* (2). But that case is reported *ex relatione,* no arguments are given, and the Vice-Chancellor said he was not aware of any authority to the contrary; whereas he would have been bound by *Chambers* v. *Goldwin* (3), before Lord *Eldon,* had that decision been cited to him.

In *Chambers* v. *Goldwin,* where a testator had directed maintenance for his daughter until twenty-one or marriage, and given

(1) 3 Sim. 533. (2) 11 Ves. 1.

her a legacy contingently on her attaining twenty-one, and the daughter married under age, the Court allowed her maintenance during the interval.

Following that authority, maintenance in this instance must be allowed, and as the Plaintiff is an infant, out of that fund which is most beneficial for him—namely, by allowing interest on the legacy: *Lucas* v. *King* (1).

Mr. *T. C. Renshaw*, for the Defendants, the brothers :—

In this instance the residue is strictly disposed of, and the directions as to maintenance are explicit. In *Chambers* v. *Goldwin* the directions were all future; here there is an express trust for accumulation during the interval.

If the testator intended to give maintenance at all during the interval between fifteen and twenty-one, it is quite as likely that he did not mean interest on £6000 to be paid out of the general residue, but rather that maintenance should come out of the Plaintiff's own share of the residue.

SIR W. PAGE WOOD, V.C.:—

I think, on the whole, the proper construction is, that maintenance should be allowed by payment of interest on the legacy.

The case of *Chambers* v. *Goldwin* is conclusive as to the question that, in some way or other, maintenance is to be allowed. There is no substantial difference between that case and the present. Here the testator has given a legacy of £6000, and a share of residue, both contingently. Hence, except upon the principle which was carried to its fullest extent in *Chambers* v. *Goldwin*, there is no possibility of giving the Plaintiff any maintenance at all. Then, the principle being, that he is to have maintenance, it follows that he must have interest upon one or the other of his legacies; and the question is, which of the two is the more beneficial for him to take. Strictly, no doubt, the question is, whether he is to have it out of the general residue, or out of his own share of the residue.

But the law says, it must be implied that, although the legacy itself is contingent, interest is to be given in the meantime. The Vice-Chancellor of *England*, in deciding *Kime* v. *Welfitt* (2), does not

(1) 11 W. R. 818. (2) 3 Sim. 533.

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appear to have had before him *Chambers* v. *Goldwin* (1), which was decided by one of our highest authorities, and is a very strong case; for there the daughter was married, and it might well have been supposed that the testator did not wish to encourage the marriage of his daughter before twenty-one, but intended that, if she should marry, she should marry some one who was capable of supporting her.

Lord *Eldon* having thus decided, I am bound to give the Plaintiff interest on one or other of his legacies, and he being entitled to both contingently, I must select that which will be most for the benefit of the infant; and declare that interest at £4 per cent. is payable upon the £6000 legacy. The costs will come out of the estate.

Solicitors: Messrs. *Smith, Stenning, & Croft.*

V.-C. W. 1866 *Jan.* 24, 25.

WHITE *v.* CHITTY.

Bankruptcy—Forfeiture—Annulment.

Testator devised freeholds to *C.* for life, with a clause of forfeiture on bankruptcy. In the testator's lifetime, *C.* was adjudicated a bankrupt, and had not obtained his order of discharge at the testator's death; but no creditors' assignee was ever appointed; and within four months after the testator's death, the bankrupt applied for and obtained an annulment of the bankruptcy. The official assignee had not, during the interval, applied for or obtained possession of the rents, *C.* himself having been in occupation of the estate:—

Held, following the authorities, that the clause must extend to a bankruptcy occurring in the testator's lifetime; but that as the bankrupt, by his diligence, had obtained an annulment of the bankruptcy before any claim made, or property handed or paid over, the forfeiture contemplated by the testator had not occurred.

RICHARD CHITTY, by his will, dated the 1st of July, 1864, devised a freehold house to the use of his son, *Charles Chitty*, for life, and, after his death, to the use of his grandson, *Richard Chitty*, son of the said *Charles Chitty*, for life, with remainder over. He also made other devises in favour of his sons, *William Chitty* and *George Chitty*, and then proceeded as follows:—

(1) 11 Ves. 1.

"Provided always, and I hereby declare, that if my said sons or grandsons, or any or either of them, shall respectively be outlawed or declared bankrupt, or shall assign, charge, or incumber his or their respective life interest or life interests in the said trust premises respectively, or any part or parts thereof respectively, or shall do or suffer anything whereby the same or any part thereof respectively would, through his or their act or default, or by operation or process of law, or otherwise, if belonging absolutely to him or them, become vested in or payable to some other person or persons, then and thenceforth the rents to which, but for this provision, he or they respectively would be entitled, shall, during the remainder of his or their life interests therein respectively, from time to time sink into and be added to and form part of my general personal estate."

Testator bequeathed his general personal estate to trustees, upon certain trusts.

On the 13th of October, 1863, before the testator's death, which took place on the 18th of November, 1864, *Charles Chitty* was adjudicated a bankrupt. No creditors' assignee was ever appointed under the bankruptcy. At the date of the testator's death, *Charles Chitty* had not obtained his order of discharge; but on the 22nd of March, 1865, the bankruptcy was annulled by the Commissioner, on the bankrupt's application, with the consent of the creditors.

The bill was filed by the executors of the will against *Charles* and *Richard Chitty*, praying for administration so far as might be necessary for determining the rights of the parties interested in the rents and profits of the real estate specifically devised to *Charles Chitty* for life, and whether the same did not form part of the general personal estate.

No demand had ever been made for the rent of the house, and none had, in fact, been paid, *Charles Chitty* having been himself in occupation.

Mr. *Haddan*, for the Plaintiffs, claimed the rents of the estate specifically devised, during *Charles Chitty's* life.

He cited *Manning* v. *Chambers* (1) and *Seymour* v. *Lucas* (2).

(1) 1 De G. & Sm. 282. (2) 1 Dr. & Sm. 177.

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Mr. *Dauney*, for the grandson, *Richard Chitty*, who was one of the persons contingently interested in the general personal estate.

Mr. *Swanston*, for *Charles Chitty*:—

By the annulment, the bankruptcy was rendered null and void *ab initio*.

In *Manning* v. *Chambers* there was a direction to trustees how to distribute the rents and profits. This is a proviso of forfeiture, which must be construed strictly. The words are all future. *Seymour* v. *Lucas* was determined solely on the authority of *Manning* v. *Chambers*, in opposition to the view which the Vice-Chancellor *Kindersley* would otherwise have taken.

The VICE-CHANCELLOR said that he must hold himself bound by the cases; but he would call for a reply as to the effect of the annulment.

Mr. *Haddan*, in reply, referred to sec. 22 of the 1 & 2 Wm. 4, c. 54, whereby official assignees were first appointed; to sections 40, 102, and 141 of the *Bankrupt Law Consolidation Act*, 1849 (12 & 13 Vict. c. 106); and to sections 108 and 117 of the *Bankruptcy Act*, 1861 (24 & 25 Vict. c. 134), to shew that immediately upon the appointment of the official assignee, and until the appointment of creditors' assignees, the official assignee has the whole of the bankrupt's estate vested in him.

Section 104 of the Act of 1849 provides for the annulment of a bankruptcy upon cause shewn to the satisfaction of the Court; and by section 155 of the same Act, in cases of annulment, protection from all claims by the bankrupt is given to all persons from whom the assignees have recovered, or who shall deliver up possession to the assignees, or pay any debt.

Prior to 1849, and while the enactment was in force whereby an order to annul a bankruptcy had the force of a *supersedeas*, it was decided by the Court of Exchequer, overruling Lord *Eldon*, that the only effect of a *supersedeas* was to deprive the Commissioners of any further authority to proceed upon the Commission; and that it had no effect on acts done before the *supersedeas* issued. So that where, before the issuing of a writ of *fi. fa.*, a fiat issued, and before the return of the writ an order of annulment

was made, and, after the return, the order was confirmed, it was held that the sheriff's return of *nulla bona* was well founded: *Smallcombe* v. *Olivier* (1).

If that be so, the title of the Plaintiffs arising by virtue of the clause of forfeiture is not affected by the subsequent annulment.

Mr. *Swanston*, in reply, on the case cited:—

The decision in *Smallcombe* v. *Olivier* was in a case where the annulment was a proceeding by consent. It would have been otherwise had the *fiat* been void *ab initio*. The Court of Exchequer themselves admitted that their decision might be supported on the lower ground that the sheriff was a public officer, even if the effect of annulling the fiat were (as is contended here) to restore all the property to the bankrupt (2).

SIR W. PAGE WOOD, V.C.:—

This case is somewhat novel, and the form which it assumes renders it difficult to decide what is the best mode of setting up the right which is here asserted.

The executors come to the Court seeking to execute the trusts of this will, and they ask the Court for a direction whether they are at liberty to proceed by way of ejectment (which would be the proper course if the trustees' contention be right), for the recovery of the rents of the estate devised by the will of the testator, the devises being all of legal estates, but accompanied by this proviso. [His Honour read the words of the clause.]

Now, these words, certainly, so far as they go, would compel the Court to hold, as in the case before Vice-Chancellor *Knight Bruce*, and in the case before Vice-Chancellor *Kindersley*, that this bankruptcy, though having taken place anterior to the date of the will, is such a bankruptcy as, if it were continuing, would authorize the Court to declare that a forfeiture had taken place, supposing the estate to be an equitable one; and consequently, in this case, to direct the executors to institute proceedings—although the words of futurity in this case are rather stronger than those which occurred in the cases referred to.

Now, I apprehend the ground of those decisions to be this:

(1) 13 M. & W. 77. (2) *Ibid.* 93.

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The testator's attention is clearly not directed to the declaration of bankruptcy, or to the period when the declaration may take place; but only to this—that the property intended for the objects of his bounty shall not pass to a stranger. He does not wish that the gift shall be a benefit to be conferred upon creditors, or upon any one other than the devisee. The true intention of his will, therefore, requires that the words of futurity should be stretched so as to include a bankruptcy existing at the date of his death.

In this case, the bankruptcy which existed at the death of the testator never proceeded beyond this. There was such an official assignee appointed as that the estate of *Charles Chitty* vested in him, but no creditors' assignee was appointed; nothing more was done; the official assignee took no proceedings by ejectment or otherwise to recover possession; and he never was in possession, for before any rents had accrued, or could possibly accrue, the bankruptcy was annulled.

I quite agree with Mr. *Haddan*, that the annulment of the bankruptcy could not have affected the rights of the Plaintiffs, if a forfeiture had already occurred.

But the question is, has a forfeiture occurred, when, before any actual demand made, or possession taken by the official assignee, before one sixpence had accrued to him, the bankrupt, by his diligence and activity, obtained an annulment of the bankruptcy, so that at the time when the first rents accrued, there was no hand but his to receive them?

That involves, to some degree, the question of the effect of annulment, and of what appears to be the state of the authorities on the subject.

Down to the case of *Smallcombe* v. *Olivier* (1), it seems to have been thought that the effect of annulling a bankruptcy was to render the state of things such as if the bankruptcy had never taken place. But the Court of Exchequer held, not only that there was, or ought to be, indemnity for all acts done before the annulment, but that, before and up to the annulling of the *fiat*, everything remained as it was by force of the bankruptcy—that up to that period the bankruptcy operated fully; and according to that *ratio*

(1) 13 M. & W. 77.

decidendi, although the adjudication of bankruptcy may have been most improper, the act of the sheriff would have been right; because, at the time of the return, the sheriff could know no better, and, therefore, made a proper return of *nulla bona*.

The Act of 1849 says that, in case of annulment, *bonâ fide* payments to assignees are to be protected from all claims of the bankrupt; leaving the point open as to how far the annulling relates back to the whole transaction.

In that state of the authorities, it would have been difficult to hold that, if ejectment had been brought, and these Plaintiffs had recovered, they would not have had protection.

But if the annulling takes place before the rents are paid or anything is done, the question is, whether it does not prevent the forfeiture from arising at all; for otherwise I do not see how this Court could have interposed, however improper and irregular the bankruptcy may have been; for it might have been said—"The forfeiture has taken place—the bankrupt has suffered the wrong of forfeiture, inasmuch as an adjudication has been made." That would have been absurd in the highest degree.

But here the annulment was made with the consent of the creditors. Then I have to consider—regard being had to all the authorities, down to the case in the Exchequer—whether or not this gentleman, having succeeded in getting the bankruptcy annulled before any part of the property was acquired under the forfeiture clause, must be regarded as having forfeited his rights, on the ground that, before the testator died, this adjudication took place.

I think, having regard to those cases in which the Courts have stretched the words of testators, by making expressions which sound in the future apply to the past, in order to effectuate the intent, and to prevent the fund going into other hands than those of the objects of his bounty, I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them.

The decree will be, that the Court, being of opinion that the forfeiture of the life interest of *Charles Chitty* has not occurred, does not think it proper to give any directions to the trustees for

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proceeding, by way of ejectment or otherwise, to recover such rents on behalf of the residuary legatees.

The costs of all parties will come out of the estate.

Solicitor for the Plaintiffs: Mr. *Kays.*
Solicitor for the Defendant: Mr. *Shiers.*

V.-C. W. 1866 *Jan.* 18, 23, 29.

MILLARD *v.* BAILEY.

Will—Construction—Latent Ambiguity—Parol Evidence.

Bequest of thirty-three shares in the *E. Gas Company* amongst the testatrix's four children, followed by a bequest of "the remaining shares" to her godchild.

The number of shares held by the testatrix was 74, of which 37 were original paid-up shares of £25 each, and 37 new £25 shares, on which £15 was paid, and which had been allotted to the holders of original shares by way of bonus; a new share being issued for each original share.

Parol evidence for the purpose of shewing that the testatrix was in the habit of treating, and intended to treat, the shares as double shares (so as to pass to her godchild, by the residuary gift, four double, and not forty-one single shares) held inadmissible.

The specific legatees allowed to take their bequests out of the original shares.

REBECCA BAILEY, by her will, dated the 29th of August, 1863, made the following bequest of certain shares in the *Epsom & Ewell Gas Company*:—

"I leave and bequeath the shares in the *Epsom & Ewell Gas Company*, as follows:—Fifteen shares to my eldest son, *John Bailey*; six shares to my son, *James Bailey*; six shares to my son, *Edwin Ward Bailey*; six shares to my daughter, *Ann Baker Bailey*, respectively; each one to enjoy the interest and profits thereon, but not the power of selling or disposing of any of them; but I leave these shares to their children for their benefit; but in default of any of my sons or daughters having any child or children, I hereby direct that these thirty-three shares shall follow the provision in the like case contained in the will of my late husband as to the distribution of the property left by him to his

sons and daughters. The remaining shares I leave to my goddaughter, *Mary Bailey Millard*."

At the death of the testatrix (in September, 1864), she was the registered proprietor of seventy-four shares, consisting of thirty-seven original, and thirty-seven new shares, in the *Epsom & Ewell Gas Company*, bequeathed to her by the will of her husband, *John Bailey*. It appeared that *John Bailey* deceased had purchased thirty-seven original shares in the company, which stood on the register under various numbers between 16 and 282. Certain works having been executed by the directors between 1851 and 1859, it became necessary to borrow money, which was repaid by instalments out of the fund which would have been otherwise applicable for payment of dividends. By way of compensation for the loss of such dividends, an arrangement was made under which the directors, in November, 1859, issued to the proprietors of original shares a like number of new £25 shares, each share being taken as paid up to the extent of £15. *John Bailey* being at that time the registered proprietor of thirty-seven original shares, received in respect of them an allotment of thirty-seven new shares, numbered 301—337, inclusive.

The question in the suit, which was instituted by *Mary Bailey Millard*, goddaughter of the testatrix, was whether, under the bequest to her of "the remaining shares," she was entitled to forty-one single or to four double shares only; the contention on behalf of the Defendants, the specific legatees, being that the shares, original and new, were always treated by the testatrix and by her husband as forming thirty-seven double shares, of which thirty-three were specifically bequeathed, leaving four for the Plaintiff as legatee of the remainder.

In support of this contention, evidence was given by the secretary of the *Epsom & Ewell Gas Company*, as to the creation and mode of dealing with the new shares. He stated that, on the proposal by the company to issue new shares, by way of bonus to the holders of original shares, to compensate them for deductions made in previous dividends, it was at first intended to convert the original shares into £50 shares. The majority of the shareholders, however, considered that it would be more convenient to have two shares of £25 each, and accordingly it was resolved to allot, by

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way of bonus to the several shareholders, one share of £25 (taken as paid up to the extent of £15), in respect of every original share. On the 18th of November, 1859, the new shares were issued, and thirty-seven of them, numbered 301—337, were allotted to *John Bailey*, in respect of his original shares, which were numbered 16—35, 139—143, 190, 191, 198, 199, 225, 226, 231, 278—282. The secretary proceeded to state, that after this allotment, the shareholders (with one exception) invariably treated and considered each original and new share as one share of £40, and on receiving dividends, gave one receipt only for the dividend paid to them, as if the shares had formed one share each of £40. In June, 1862, when the testatrix called on the witness to receive her dividends, the following conversation took place :—

Mrs. *Bailey*.—"I have thirty-seven shares, have I not?"

Secretary.—"Yes; but you must remember, there have been some new shares added to them."

Mrs. *Bailey*.—"Yes, I know; they are double shares; but as my late husband always called or considered them as thirty-seven shares, I shall continue to do the same."

After deposing that a similar conversation took place in June, 1864, the secretary proceeded to mention that *Chandler*, one of the shareholders, had sold his new shares separate and distinct from his original shares; but that that was the only instance of a dealing with the new separately from the original shares.

The medical attendant who had prepared Mrs. *Bailey's* will, also gave evidence of conversations with the testatrix and with the secretary, from which he derived the impression that the shares, original and new, constituted one share of the nominal value of £40, and that this was the idea of the testatrix in dealing with the shares by her will.

Mr. *Prendergast*, for the Plaintiff, contended that the gift was of the whole number of shares possessed by the testatrix, which, according to the register, and the ordinary meaning of the words, consisted of seventy-four single, and not of thirty-seven double, shares; and that the specific legatees could not select all the original paid-up shares, so as to leave the Plaintiff, as residuary

legatee, all the new shares and only four of the original shares (1): *Jacques* v. *Chambers* (2). The case was not one in which parol evidence, for the purpose of explaining the words of the will, was admissible.

Mr. *Fischer*, for the specific legatees, contended that the Court was entitled to look at the evidence which was tendered as to the statement made by the testatrix herself, that she should, as her husband had done, continue to treat the shares as double shares, for the purpose of explaining the doubt which arose upon the will. The case fell within the rule laid down by Chief Justice *Tindal*, in *Shore* v. *Wilson* (3), that where "the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning," evidence would be admitted to expound the real meaning of the language used: *Smith* v. *Wilson* (4); *Richardson* v. *Watson* (5); *Miller* v. *Travers* (6); *Clayton* v. *Gregson* (7); *Knight* v. *Knight* (8).

Mr. *Prendergast*, in reply, referred to *Brown* v. *Selwin* (9) and *Doe* v. *The Earl of Jersey* (10).

SIR W. PAGE WOOD, V.C.:—

The words of the testatrix's will are plain enough in themselves, but it appears that she had thirty-seven original and thirty-seven new shares, and the question is whether the thirty-three shares are to be treated as double shares (on the assumption that each original and new share form together one share of £40), or whether they are each to be taken as single shares, so that she would have had seventy-four to dispose of. Evidence has been given by the secretary as to the way in which these new shares were created, and he has deposed to a conversation with the testatrix in which she said, "As my late husband always considered them as thirty-seven shares, I shall continue to do the same." However much one may regret the result, I cannot treat the description of these

(1) Digest, lib. xxx. tit. 1. cap. 37.
(2) 2 Coll. 435.
(3) 9 Cl. & F. 545, 566.
(4) 3 B. & Ad. 728.
(5) 4 B. & Ad. 787; 1 Nev. & M. 567.
(6) 8 Bing. 244.
(7) 5 A. & E. 302.
(8) 2 Giff. 616; 1 Jar. Wills, 386, &c.
(9) Cas. t. Tal. 240.
(10) 1 B. & A. 550.

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shares in the will as being of double and not of single shares. The authorities shew that in particular counties there may be particular denominations used for measures of land or other things, of universal application in the district, and that parol evidence is admissible for the purpose of explaining the custom of the district or of the usage of the particular class of persons to whom the testator belonged. But where, as in this case, these new shares appeared on the register in different numbers from the original shares, and one, at least, of the holders had dealt with them separately from his original shares, I cannot hold that there is any evidence admissible to shew that the shares were treated by all holders as double shares. I must take things to be as I find them, and I cannot allow particular expressions, said to have been used by this testatrix, to prevail where they are not the general language universally applicable to the particular subject-matter. As to some of the shares being paid up in full and some not, the decision of Vice-Chancellor *Knight Bruce* in *Jacques* v. *Chambers* applies, and the specific legatees are entitled to the original paid-up shares in exclusion of the new shares. There must be a declaration that the several specific legatees in the testatrix's will mentioned, took the respective numbers of shares in the *Epsom & Ewell Gas Company*, given to them by the said will as single paid-up shares in the said company, excluding the additional shares allotted to the testatrix's husband in respect of his original shares, and that the residue passed to the Plaintiff.

Solicitor for the Plaintiff and Defendants: Mr. *G. White.*

CAMPBELL *v.* CAMPBELL.

Portions—Satisfaction.

V.-C. W.
1866
Jan. 11, 22.

By a settlement made in the Scotch form upon the marriage of his daughter with a domiciled Scotsman, *A.*, a domiciled Englishman, covenanted to pay the trustees £4000 as a provision for the benefit of his daughter and her husband and the younger children of the marriage. The £4000 was not paid by *A.* during his lifetime; but by his will made after the death of his daughter, *A.* gave £16,000 between the younger children of the marriage:—

Held, that the will being an English disposition, the English doctrine of presumption against double portions was applicable, and that the provisions made by the testator's will in favour of his grandchildren operated as a satisfaction of the provisions made for them by the settlement.

THIS was a suit for the administration of the estate of the late Dr. *Hume* (a domiciled Englishman), by the trustees and executors of his will, and raised the question whether certain legacies given by the testator's will to the younger children of his daughter operated as a satisfaction of an obligation by the testator, contained in his daughter's settlement or marriage contract to pay to the trustees therein named £4000, as a provision for his daughter and her husband and the younger children of the marriage.

By the settlement or contract of marriage, which was made according to the forms of the law of *Scotland*, and was executed at *Cheltenham* on the 12th of February, 1834, the testator *John Robert Hume*, for the causes and in consideration of the provisions in the marriage contract settled on his daughter and on the children of the intended marriage, by *Archibald Campbell*, the intended husband (a domiciled Scotsman), "thereby bound himself, his heirs, executors, &c., immediately after the solemnisation of the marriage, to pay as a provision for his daughter" to the trustees therein named £4000, which sum was to be held "for the liferent use allenarly of the said *John Robert Hume*, during all the days of his life;" and after his death the same was to be held "for the liferent use of the said *Archibald Campbell* and *Elizabeth Hume* and the survivor of them," and at the death of the last survivor of them, the fee or property of the said sum was to be divided amongst

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such of the children of the intended marriage as should not be an eldest son, according to the appointment of the husband, or failing his appointment of the wife, and failing such appointment by either of the parents, equally among the said children. Failing children of the marriage the principal was to be paid to the husband, his heirs and assigns whomsoever. It was also declared that "the provision before written, conceived in favour of the then intended marriage," should be "in full satisfaction of all bairns' part of gear, legitim portion, natural executry, and everything else they could ask and claim by and through the decease of their father and mother." The marriage took place, and Mrs. *Campbell* died in 1847, in her father's lifetime, leaving two sons and three daughters. The £4000 was not paid by the testator during his lifetime, and, as the bill alleged, was by the law of *Scotland* now chargeable as a debt upon his estate.

By his will, dated the 21st of February, 1857, Dr. *Hume* bequeathed all his personal estate upon trust to raise and pay the following legacies: viz., £5000 to each of his granddaughters, and £6000 to his grandson, *Robert Hume Campbell* (the younger son of the marriage). The trustees were directed to stand possessed of such legacies or sums of money (which were to be invested in English funds) and of the interest, in trust for the said grandchildren, with powers of maintenance and advancement. In case any of such grandchildren should die under twenty-one years, the legacy or moneys of him, &c., so dying to belong to his issue, if any, and if no such issue, to such of the grandchildren as should live to attain twenty-one. After some further bequests of specific chattels, the will contained a residuary gift in favour of testator's grandson, *Archibald Neil Campbell*, the elder son of the marriage.

The question argued was, whether the gifts contained in Dr. *Hume's* will, in favour of the younger children of the marriage, operated as a satisfaction of the testator's contract to pay £4000 as a provision for his daughter and her husband and their younger children.

Evidence was tendered for the purpose of shewing an intention on the part of the testator to give the younger children these legacies in satisfaction and discharge of the £4000, and a draft

will of 1851 was produced, which contained a declaration that the several legacies (of much the same amount as those contained in the executed will), given to the children, should be taken in lieu of, and be deemed to be in full satisfaction and discharge of, all moneys by him covenanted or agreed to be paid unto them by the marriage contract of 1834. Conversations by the testator with his son-in-law *Archibald Campbell* to the same effect were also deposed to. An opinion had been given by two Scottish advocates, which was submitted to the Court, to the effect that, according to the law of Scotland the doctrine of presumption against double portions did not exist, and that the obligation to pay £4000 constituted a debt against the testator's estate, which would not be satisfied by legacies to the persons claiming as creditors; but that as the testator, was a domiciled Englishman, the case must be viewed as if the whole transaction had taken place in *England*, and be governed by English law.

Mr. *Boyd Kinnear*, for the Plaintiffs, the trustees of the will:—

Mr. *Pember* (Mr. *Rolt*, Q.C., with him), for the eldest son of the marriage, contended that the legacies operated as a satisfaction of the portions provided by the marriage contract. The circumstance that the testator had taken the father into his counsel, and had on several occasions stated that he intended to provide for the children was sufficient to shew that the testator placed himself in *loco parentis* to them and intended to provide portions for them: *Powys* v. *Lord Mansfield* (1). Assuming that the testator had placed himself in *loco parentis*, then the presumption arose that satisfaction, and not a double portion, was intended; and the differences in the amount of the portions were not sufficient to rebut this presumption: *Coventry* v. *Chichester* (2). But if the testator did not stand in *loco parentis* to these children, then the children were in the position of creditors of the testator, and subject to the presumption that, when a debtor bequeaths to his creditor a legacy of equal or greater amount than the debt, the legacy was intended by the testator as a satisfaction of the debt: *Chancey's Case* (3); *Wathen* v. *Smith* (4). Nor was this presumption rebutted even

(1) 3 My. & Cr. 359.
(2) 2 D. J. & S. 336.
(3) 1 P. Wms. 408; 2 Tu. L.C. 318.
(4) 4 Madd. 325.

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where the creditor was the child of the debtor: *Williams* on Executors, 1167.

Mr. *G. M. Giffard*, Q.C., and Mr. *Rawlinson*, for the younger children:—

Both the legacies and the provision contained in the marriage contract are payable. If there is any difference in the mode in which the two sums are payable, or in the limitations of the will and the settlement, then the presumption of satisfaction will be rebutted. Here the differences are substantial, the amount given is very different, and the settlement is expressed to be a provision for the testator's daughter in the first instance, while the will which is made after her death is a provision for the children exclusively. To constitute a portion it is essential that the gift should proceed from a parent, or some one in that position; but here there is no sufficient evidence that the testator placed himself in *loco parentis* to these children, who were being maintained by their father, a gentleman of ample means, and none of those circumstances are here to be found which were relied upon by Lord *Cottenham* in *Pym* v. *Lockyer* (1); *Parsons* v. *Peters* (2). If the children are to be treated as creditors, then *à fortiori* the differences are sufficient to rebut the presumption that the legacies were given in satisfaction of the debt: *Earl of Durham* v. *Wharton* (3).

Mr. *A. G. Langley*, for other parties.

Mr. *Pember*, in reply.

Jan. 22. SIR W. PAGE WOOD, V.C.:—

This case involves a short point arising upon the will of the late Dr. *Hume*, who bequeathed legacies of considerable amount to each of his grandchildren, the younger children of his daughter, he having in his lifetime settled, by an instrument in the Scottish form, £4000, a sum less than the provisions made by his will, upon his daughter for life, and after the death of the survivor of herself and her husband, upon certain trusts for the benefit of her

(1) 5 My. & Cr. 48. (2) 11 Jur. (N. S.) 150.
(3) 3 Cl. & F. 146.

younger children, as declared in that Scottish instrument. The question is, whether the provisions made by the will are to be taken in satisfaction of the provision made by the settlement. According to the opinion of the Scottish advocates, it would seem that by the Scotch law the legacies would not be a satisfaction of the gift by the settlement; but that opinion is delivered without reference to the English doctrine of presumption against double portions.

It has been contended further, that, the settlement being before the date of the will, the legacies are not to be held a satisfaction of the daughter's portion, even admitting the maxim of English jurisprudence as to presumption against double portions, because this testator did not place himself in *loco parentis* towards the children of his daughter.

Kippen v. *Darley* (1) is an authority to shew that the presumption against double portions established in *England* does not exist in the law of *Scotland*. Regarding the claim under the settlement as a debt, I think that it could not be held to have been satisfied by the gift contained in the will, from the different character of the provisions by which that gift is accompanied. With regard to portions, after the case of *Thynne* v. *The Earl of Glengall* (2), it is impossible to hold that the difference is such as would prevent the gifts by will from operating as a satisfaction of the portions, in case the doctrine of English law has application. The Scottish advocates are of opinion—and, indeed, I think everyone must be of opinion—that the whole will must be construed in the same manner as the will of any English testator. That being so, and the question of intention arising, it appears to me that I must hold the intention to be that which would be imputed to any other English testator making provision for his children, and that he did not intend by his will to make a second provision for those for whom he had already provided by another instrument. Upon the question whether the testator has placed himself in *loco parentis* to these grandchildren, the case is a great deal stronger than *Powys* v. *Lord Mansfield* (3). That was the case of an uncle making provision for his brother's children, who were living under their father's roof,

(1) 3 Macq. H. L. 203. (2) 2 H. L. C. 131. (3) 3 My. & Cr. 359.

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but for whom the uncle had expressed an intention to provide, and in some instances made provisions in the character of portions. Here there was not only the expressed intention, but the actual fact, that the instrument by which provisions were made for the grandchildren was a settlement for the benefit of the testator's daughter and her children. It appears to me, therefore, that I must hold the provisions contained in the will to have been intended, and to operate, as a satisfaction of the provisions made for the younger children of the testator's daughter by the settlement of 1834.

Solicitors: Messrs. *E. & F. Bannister & Fache.*

V.-C. W. 1865 *Dec.* 14, 19

BOVILL *v.* CRATE.

Injunction—Patent—Laches.

Where an interlocutory injunction to restrain infringement of a patent was moved for in a suit in which the bill was filed in July, and it appeared that the Plaintiff wrote complaining of the infringement in the preceding November, and knew of the Defendant's proceedings in the previous August, the injunction was refused on the ground of delay.

Observations on the course to be pursued by a patentee seeking a remedy against numerous persons who are all alleged to be infringing the patent at the same time.

THIS was a motion on behalf of the Plaintiff, *George Hinton Bovill*, for an injunction to restrain the Defendant, *Augustus Crate*, for the residue of a term of five years from the 5th of June, 1863, from using an invention and improvements for which a patent had been granted to the Plaintiff in 1849, and renewed in 1863.

The subject of the patent was an improved method of grinding corn. The bill was filed in July, 1865, and the Defendant, by his answer, denied the validity of the patent on the ground of want of novelty, and also denied infringement.

The Plaintiff in his affidavit in support of the motion said that the validity of his patent had been established in numerous actions and suits which he described, and that his application in 1863, for prolongation of the patent, was opposed by a combination of millers, sixteen caveats having been entered against the Petition,

upon which—except two—the parties appeared, and evidence was entered into on their behalf. Also that "several millers and other persons, including the Defendant, had formed themselves into an association or combination" for the purpose of using his invention, and of opposing his letters patent, and preventing persons from taking licenses; and that they had issued circulars and reports to the Defendant and other millers, indicating modes by which, as they alleged, certain processes might be used in mills without infringing the patent, and requesting such persons to apply to Mr. *Collins*, as the secretary of the association, and to Messrs. *Sale & Co.*, of *Manchester*, the solicitors, for information and assistance. Further, that the documents issued by the association clearly shewed that the processes recommended by them to be used were an infringement; and that the Defendant, as Plaintiff believed, was defending this suit at the instance and under some indemnity from the association, or some of its members.

The Defendant, by his affidavit in reply, admitted that he was a member of an association of millers originally formed in September, 1864, in the neighbourhood of *Manchester*, who issued a circular which he set forth. It was headed "*Bovill's* Patent," and stated that a number of persons having a common interest in shewing the invalidity of Mr. *Bovill's* claim, had, with a view as far as possible to save the expense of various actions at law, entered into an agreement to jointly defend any action which might be brought against any one of their number, each person or firm contributing towards the expenses in proportion to the number of pairs of stones to which the process was applied. The Defendant also admitted that the association had, through its secretary, agreed to pay any costs incurred in defending the suit, and that he had paid the association £32 in several calls.

Sir *H. Cairns*, Q.C., Mr. *Druce*, and Mr. *Theodore Aston*, for the Plaintiff.

Mr. *Rolt*, Q.C., Mr. *Little*, and Mr. *W. N. Lawson*, for the Defendant:—

It is not questioned that where a patent has been once fairly established, and there is a clear case of infringement, the Court will, even before the hearing, grant an interlocutory injunction:

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Davenport v. *Jepson* (1). But in this case the patentee has shifted the ground upon which he established his claim in the former litigations in which he was successful. Having formerly succeeded in sustaining a patent for a combination of two processes, he now seeks relief against the infringement of one only of those processes. [This part of the case was argued at length.]

The Plaintiff knew of the Defendant's proceedings in July or August, 1864, and wrote to him on the 9th of November, stating that he had ascertained that the Defendant had been infringing the patent for a year and ten months previously. A correspondence ensued; and after that period of delay and amount of negotiation, it is out of the question for the Plaintiff now to apply for a summary and speedy remedy.

The VICE-CHANCELLOR asked how it was possible, after that correspondence, to ask for an interlocutory order?

Mr. *Druce* said it was impossible for the Plaintiff to proceed at once against every one who was infringing. The parties to the agreement for a combination were no less than eighty-nine ten days ago, and they might be more numerous now. Was the Plaintiff at once to file eighty-nine bills against these persons? After the observations that had been made in *Foxwell* v. *Webster* (2) it was very difficult for a patentee to know how he was to proceed when his patent was being invaded by a great number of infringers at the same time.

SIR W. PAGE WOOD, V.C.:—

There is some difficulty, no doubt, but the case stands thus. The Plaintiff selects his man in November of last year; he enters into correspondence, and tells him he will proceed immediately if he does not accede to the Plaintiff's views. Then, though the parties may be as numerous as has been suggested, the difficulty is this—that if a patentee lies by, allowing a person during that time to continue doing that which he says is an infringement of his patent, the observation arises which was made by the learned Judge in *Bridson* v. *Benecke*, that if the Plaintiff had only pro-

(1) 1 N. R. 173. (2) 3 N. R. 103, 180.

ceeded as he said he would, the cause would now be at the hearing, instead of at the interlocutory stage; and, instead of having to consider questions of convenience or inconvenience, and the propriety or impropriety of proceeding on an interlocutory application, the Court would have the opportunity of forming a decided view of the case, and concluding the right.

I do not think the Plaintiff is put in so great a difficulty as he alleges with reference to filing bills. That the Plaintiff should desire to obtain an interlocutory injunction, I can easily understand, because, by taking this course, he has a very reasonable mode of compensating himself by way of royalty, but his object will be attained by having an account kept, always supposing the Defendant to be honest. And as to the other difficulty which the Plaintiff suggests, it seems to me there is a way of avoiding it.

Every patentee is subjected to difficulties of a very serious character in all the litigations he carries on; but it appears to me instead of filing many bills—and I see something of the kind was said in *Foxwell* v. *Webster* (1)—he might take this course: After getting information of case after case of infringement, he might select that which he thought the best in order to try the question fairly, and proceed in that case to obtain his interlocutory injunction. He might write at the same time to all the others who were *in simili casu*, and say to them: "Are you willing to take this as a notice to you that the present case is to determine yours? Otherwise I shall proceed against you by way of interlocutory injunction; and if you will not object on the ground of delay, I do not mean to file bills against all of you at once. Am I to understand that you make no objection of that kind? If you do not object, I shall file a bill against only one of you." I do not think any Court could complain of a patentee for taking the course I am suggesting. That is one way in which the difficulty might be avoided.

On the other hand, it is very important to the practice of the Court, not to have it cited as authority hereafter, that the Court will grant such relief as is here asked, upon an application made in July, 1865, when it is informed that the Plaintiff certainly, as early as in August, 1864, and, probably in July, 1864, knew what he knows now of the Defendant's proceedings. Knowing every-

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thing in August, 1864, he enters into communication with the proposed Defendant in November, 1864, and is told by him exactly what he is doing, and that within a fortnight after his applying to him. He does not take any further step until the month of January, when he writes, and receiving no answer, he again writes in April, and says, "I shall file a bill if you do not answer within a week," to which the solicitor replies that he will accept service. He then does not file a bill until July. In that state of things it would be contrary to all that this Court is in the habit of doing if I were to grant an interlocutory injunction.

It is solely upon that ground that I decline to make the order in this interlocutory stage. Of course the Defendant must keep an account, and the costs will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Harrison, Beal, & Harrison.*
Solicitors for the Defendant: Messrs. *Reed & Phelps.*

V.-C. W. 1866 *Jan.* 11.

BARRS v. FEWKES.

Appeal—Practice—Stay of Execution.

Where a Plaintiff had obtained a decree, ordering him to be let into possession of real estate; on motion by the Defendant, who was about to appeal, the Plaintiff declining to give security to refund the rents in the event of the decree being reversed, execution of the decree was ordered to be stayed till further order; the Defendant giving security for what should be found due from him in respect of past rents: the future rents to be paid into Court, with liberty to the Plaintiff to apply in Chambers as to maintenance, and for costs of the appeal.

30 L.J. Ch. 576. 68 Eq. 617

BY a decree in this suit, dated the 5th of July last, it was declared that, according to the true construction of the will of the testator in the cause, the Defendant, *Thomas Fewkes* (who was the executor of the will), was a trustee of the testator's real estate for the Plaintiff, *Walter Barrs*, as heir-at-law of the testator; and, amongst other things, it was ordered that the Plaintiff be let into possession of the same real estate. (The case is reported on demurrer, 2 H. & M. 60).

On the 6th of July, the Plaintiff's solicitor wrote to the Defen-

dant's solicitors, suggesting that the Defendant should sign a notice to the tenants to pay the rents to the Plaintiff, and demanding possession of a house of which the Defendant and another were in joint occupation.

The Defendant's solicitors said that they could not comply with the request, and wrote again a few days afterwards, proposing, as their clients had been advised to appeal to the House of Lords, that, in the meantime, all moneys that had been received by the Defendant from the real estate, and all future rents, should be paid into a bank in the joint names of Plaintiff's solicitor and others; and that Defendant's solicitors should in future, until the appeal, receive the rents, keeping an account, and giving an undertaking to pay over the same into the same bank.

On the 15th of August, Plaintiff's solicitor wrote, saying he could not accede to the request; and on the 18th a formal notice was served on the tenants on behalf of the Plaintiff, requiring them to pay the rents to him.

It further appeared that on the 15th of November the Defendant, *Fewkes*, sent letters to the tenants, applying for payment of the rents to him; and on the 22nd the Plaintiff gave notice of a motion for an injunction to restrain the Defendant from getting in and receiving any of the rents. This motion stood over on the Defendant's undertaking; and then, on the 30th of November, the Defendant gave notice to move to stay execution, until the appeal should be determined, of that part of the decree by which possession was ordered to be delivered up to the Plaintiff. This motion was also ordered to stand over.

Finally, on the 4th of January, the Plaintiff gave notice to move that the Defendant might be ordered, within seven days after service, and in obedience to the above-mentioned decree, to let the Plaintiff into possession of the real estate; and that, for that purpose, he might be ordered, within the time aforesaid, to deliver up possession to the Plaintiff of such parts of the same as were in his own occupation, and to sign a direction to the tenants to pay the rents to the Plaintiff.

The evidence in support of the Defendant's motion was to the effect that the Plaintiff was a labouring man, poor, and of intemperate habits.

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Mr. *Willcock*, Q.C., and Mr. *A. Smith*, for the Plaintiff:—

The second motion has become necessary in consequence of no time having been fixed for giving up possession. The Defendant has been in possession eighteen months; of some part of the property, personally; and the Plaintiff meanwhile has not reaped any fruits of the decree.

Mr. *W. M. James*, Q.C., and Mr. *Cracknall*, for the Defendant:—

If the decree should be reversed, it is to the last degree improbable that the Plaintiff will ever refund any rents which may be paid to him in the meantime. They cited *The Mayor, &c., of Gloucester* v. *Wood* (1); *Lord* v. *Colvin* (2); *Gibbs* v. *Daniel* (3).

Mr. *Willcock* and Mr. *A. Smith*, in reply on the Plaintiff's motions, and in defence on the cross motion:—

The poverty of the Plaintiff is a reason why he should be furnished with funds to defend the appeal. Whatever may be the result, in all probability the costs will be ordered to come out of the estate.

The following cases were relied upon: *Walburn* v. *Ingilby* (4); *Huguenin* v. *Baseley* (5); *Waldo* v. *Caley* (6); *Willan* v. *Willan* (7).

The sole contention here is as to income. No doubt the *corpus* of property ought to be put *in medio* pending an appeal, but it is otherwise as to income. The damage to the Plaintiff by withholding these rents will be irreparable; and the greater wealth of the Defendant may cause an undue pressure to be put on the Plaintiff to induce him to submit to a compromise.

SIR W. PAGE WOOD, V.C.:—

After the decision of the Lords Justices in *Gibbs* v. *Daniel* (8), I think it is impossible that I can do otherwise than stay execution of that part of the decree which orders possession to be given up, upon terms.

Of late years, the Court has certainly from time to time listened

(1) 3 Ha. 150
(2) 1 Dr. & Sm. 475.
(3) 4 Giff. 41 (n). 3 De G F J. 479.
(4) 1 My. & K. 61, 84, & 85 note (*a*).
(5) 15 Ves. 180.
(6) 16 Ves. 212.
(7) *Ib.* 215.
(8) 4 Giff. 41 (n). 3 De G F J. 479.

(3 H & M 632 C & J 632.

more favourably to applications of this nature for the stay of proceedings pending a Petition of appeal, when money has been ordered to be paid, than in earlier times. This it may have done possibly on the following ground:—In the earlier cases, such applications were frequently made merely for the purposes of delay; and, whether so or not, parties were kept out of possession for much longer periods, as the Courts were then constituted, than they are at present. Now that appeals are conducted with so much greater rapidity than formerly, these applications have been more frequently granted. One of the strongest cases that I know is that where payment of costs has been ordered, and where such payment would lead to irreparable loss, owing to the strong improbability of its ever being refunded, in case of the decree being reversed.

The case before me is certainly much stronger than that before the Lords Justices. In that instance, the Defendants had been ordered to pay the Plaintiffs a sum of 700*l.* for costs, and there was very great doubt whether the Plaintiffs would have refunded it if the decree had been reversed. Their Lordships directed execution to be stayed till security was given for refunding the costs.

Here that course cannot be taken; and it seems to me that allowing the execution of this decree to proceed would be causing an irreparable injury to the Defendant, if the result of the appeal to the House of Lords should be favourable to him. At the same time, it is absolutely necessary, and justice requires, that the fund should be paid into Court; and that the Plaintiff should have the means of conducting his defence before the House of Lords, and should be allowed some payment by way of maintenance in the mean time.

In exercise, therefore, of the discretion of the Court upon the whole case, considering this to be a perfectly *bonâ fide* appeal, and that it is meant to be prosecuted at the earliest possible moment, I think the proper order to be made is the following:—

The Plaintiff's counsel declining to give security to refund the rents in case of the decree being reversed or varied on appeal to the House of Lords, let proceedings under the decree with reference to the delivering up of possession to the Plaintiff be stayed

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till further order; and direct the Defendant to give security, to be approved in Chambers, for payment of what shall be found due from him under the decree in respect of past rents, and to pay into Court all rents received, or to be received by him since the decree, upon affidavit, within a fortnight; the Plaintiff to have liberty to apply at Chambers as to maintenance and for costs of defending the appeal.

Mr. *W. M. James* submitted that the Plaintiff ought to pay the costs of the motions, and cited *The Earl of Shrewsbury* v. *Trappes* (1).

SIR W. PAGE WOOD, V.C.:—

I think the costs of the motion for the injunction, and of the cross motion for staying proceedings, ought to be paid by the Defendant. The former motion became absolutely necessary, in consequence of the Defendant's notice to the tenants to pay the rents to him. It was impossible to allow him to go on receiving the rents without giving an undertaking.

The costs of the Plaintiff's motion of to-day will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Williamson, Hill, & Co.*
Solicitor for the Defendant: Mr. *Sadler.*

(1) 2 De G. F. & J. 172.

SMITH *v.* MOFFATT.

V.-C. W.
1865
Dec. 8.

Insolvency—Foreign Court—Jurisdiction.

The Plaintiff, a native of one of the colonies, alleged that he had taken the benefit of a Colonial Insolvent Act, in consequence of having had a judgment recovered against him in the Colonial Court, from which judgment he had appealed, but unsuccessfully; that the assignee, now in *England*, had assets in his hands, out of which, if the judgment were reversed, a large surplus would be coming to him; that the judgment was the result of an erroneous decision, and an appeal would probably be successful, but that the assignee, colluding with the judgment creditor, refused to prosecute such appeal; and prayed that the assignee might be decreed to prosecute the appeal, or that the Court would enable the Plaintiff to prosecute the appeal in the name of the assignee.

Held, that there was no sufficient averment that the Plaintiff had failed to obtain justice in the ordinary tribunals of his own country to empower the Court to interfere; and demurrer allowed.

THIS was a demurrer.

From the statements in the bill, it appeared that the Plaintiff, who was a native of the *Gold Coast*, from 1844 down to 1859, was in business as a merchant at *Cape Coast Castle*, and employed Messrs. *Forster & Smith* as his *London* agents, who, in 1860, authorized the Defendant, *J. E. P. Moffatt*, to take proceedings against the Plaintiff for the recovery of an alleged debt of £18,556 15s. 9d. in the Supreme Court of the colony.

The Plaintiff appeared and defended the action, and, as he alleged, established to the satisfaction of the judge, that *Forster & Smith* had overcharged him, and that upon the true balance of accounts they were indebted to him in a sum of not less than £9000; but that upon *Moffatt* pleading the *Statute of Limitations*, the Judge decided in his favour, and directed the account to be taken, disregarding all items earlier than six years before the commencement of the action; and judgment was entered up against the present Plaintiff for £16,237 9*s.* 10*d.*

The Plaintiff thereupon appealed to the Governor and the Legislative Council, who are the Court of Appeal from the Supreme Court; but the Governor and Council, for some reason of which the Plaintiff was ignorant, refused to entertain the appeal; and

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the Governor (*Andrews*) privately recommended the Plaintiff to declare himself an insolvent.

The Plaintiff being, as he said, without professional advice or assistance, accordingly, in October, 1860, caused himself to be declared an insolvent, according to the procedure of the colony; and the Defendant *Moffatt* was appointed assignee.

The two other Defendants, Messrs. *McIntyre & Edwards*, were agents of *Forster & Smith* at the *Gold Coast;* and the allegation was that *Moffatt* appointed *McIntyre & Edwards* to act in his place as assignees of the Plaintiff's estate, as if they had been legally appointed under the insolvency; but that they had never been so appointed, either by the Court or the creditors, and that they had never rendered any account.

One of the payments claimed by *Moffatt* to be allowed to him, was a sum of £1801 6*s.* 6*d.*, alleged to have been paid as a dividend on the judgment debt; but as the Plaintiff contended that no part of the debt was due, he submitted that such payment, if ever made, was made by the Defendant *Moffatt* in his own wrong.

The bill further alleged that the judgment of the Supreme Court was erroneous, as there was no law or statute of limitations in the colony, and that the Plaintiff had required the Defendants, as such assignees as aforesaid, to appeal to the Privy Council, and that he was advised such appeal would, in all probability, be successful, and had offered indemnity; but that the Defendants colluding with *Forster & Smith*, and with a view to their own interests only, had constantly refused to appeal against the judgment, or to permit the Plaintiff to use their names for the purpose; also that the Plaintiff's debts under the insolvency, amounted in all to £285 18*s.* 11*d.* over and above the judgment debt; and if the judgment debt were set aside or reversed, there would be a large surplus due to the Plaintiff after payment of all his debts in full.

The bill prayed for an account of the estate of the Plaintiff come to the hands of the Defendants, or any of them, or which, but for their or his wilful default, would have so come, and for payment; and that the Defendants, or some or one of them, might be decreed to prosecute an appeal to the Privy Council against the judgment, or that in default thereof, the Plaintiff might be at liberty to use the name or names of the Defendants,

or any one or more of them, in prosecuting such appeal, on the Plaintiff providing an indemnity against payment of costs or otherwise.

The Defendant *McIntyre* was out of the jurisdiction, and the demurrer was filed by the Defendant *Edwards*, for want of equity and want of jurisdiction.

The *Attorney-General* (Sir *Roundell Palmer*), and Mr. *Everitt*, in support of the demurrer:—

The allegation in the bill that *McIntyre & Edwards* were not duly appointed assignees, is not true in fact, and we offer to the Plaintiff leave to amend in this particular.

This was assented to by the Plaintiff's counsel.

On the question of jurisdiction, this Court is not a tribunal of appeal from the Supreme Court of the Cape Colony; and as to the Privy Council, the Order that application for leave to appeal must be given within fourteen days has not been complied with.

The Plaintiff himself is the proper person, if any, to have instituted the appeal. He should have moved the Court of Appeal to remove the assignee, and is not entitled to file a bill in Chancery. The cases in which an insolvent has been permitted to proceed in this Court against his assignee, are only where all the debts have been paid, or where there has been a failure of natural justice. The allegation that the result of the appeal would, in all probability, be successful, is very faint: *Foss* v. *Harbottle* (1); *Kaye* v. *Fosbrooke* (2); *Heath* v. *Chadwick* (3); *Rochfort* v. *Battersby* (4); *Yewens* v. *Robinson* (5); *Dyson* v. *Hornby* (6).

The only difference between this and the other cases is that, here there was a foreign jurisdiction. But that, *per se*, is not sufficient to support such a bill: *Simpson* v. *Fogo* (7).

The distinction in *Troup* v. *Ricardo* (8), following *Lautour* v. *Holcombe* (9), was, that in that case there had been a re-vesting order; and the Plaintiff could not get relief in the Insolvent Court without setting that particular transaction aside.

(1) 2 Ha. 461.
(2) 8 Sim. 28.
(3) 2 Ph. 649.
(4) 2 H. L. C. 388, 409.
(5) 11 Sim. 105.
(6) 7 D. M. & G. 1.
(7) 1 H. & M. 224-5.
(8) 10 Jur. (N. S.) 1161.
(9) 8 Sim. 76.

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This case was one of mercantile law, and therefore peculiarly within the cognizance of the Colonial Court.

Mr. *G. M. Giffard*, Q.C., and Mr. *A. E. Miller*, for the bill:—

The relief prayed in this case is precisely within the principle of *Troup* v. *Ricardo*. The assets are in *England;* and if the allegations be taken to be true, there is a balance of £8000 due to the Plaintiff. If, then, the Court finds a man in this country with the property of another unjustly in his possession, it will grant relief.

There has been a failure of justice in the African Court, and it must be taken that the Plaintiff has no remedy left there. But the Court is not called upon to sit in appeal from the Colonial Court; it is asked to give the Plaintiff an opportunity of appealing. The allegation that the appeal would be successful is as positive as is possible with regard to a future event.

The case against the Defendant is that he was an assignee in his own wrong; and that he had acted solely for the benefit of one creditor, who, if he were removed, would appoint another creature of his own in his place. In such a state of things there is ground for application to this Court: *Benfield* v. *Solomons* (1).

[The VICE-CHANCELLOR observed that that was an application to the Lord Chancellor sitting in bankruptcy.]

See further *Lord Cranstown* v. *Johnson* (2); *In re Young* (3); *Spragg* v. *Binkes* (4); *Innes* v. *Mitchell* (5).

SIR W. PAGE WOOD, V.C.:—

I think the demurrer must be allowed in this case. The bill is founded on what appears to be a new kind of relief, such as was asked in *Troup* v. *Ricardo;* but one of the principles relied upon in that decision does not affect this case.

The question is, whether or not an insolvent who has taken the benefit of such remedies for his relief as were afforded by the Court of the *Cape Coast* colony, and who by his bill states that he has voluntarily placed the whole of his property in the hands of the

(1) 9 Ves. 77, 84. (2) 3 Ves. 170. (3) 12 W. R. 537.
(4) 5 Ves. 583. (5) 1 De G. & J. 423.

assignee, and that a judgment debt was recovered against him, which judgment he is entitled to dispute, can, on the ground that the assignee refuses to appeal against the judgment, come to this Court to obtain leave to prosecute the appeal in the name of the assignee.

The rest of the relief is put entirely on the footing that there will be no surplus unless this particular debt be got rid of. But the Plaintiff himself, for some reason of which we are ignorant, failed in an attempt to appeal from this very judgment, and the assignee, therefore, is bound to treat it as subsisting.

The question, therefore, is, whether this Court can compel the assignee to appeal.

Independently of this, as regards the question of taking an account between the parties, following the decision in *Dyson* v. *Hornby*, I am bound to consider the Insolvent Court abroad competent to deal with the question, and it is not the mere circumstance of the assignee being in this country with funds in his hands, that will be sufficient to give the Court jurisdiction.

The Plaintiff is in an unfortunate situation. He cannot say there is a surplus, because the judgment is outstanding, which, if it stands, will exhaust the whole of his assets. He wishes to dispute the debt, but he cannot, because his assignee will not sue on his behalf; and the question is, what is his remedy? It is quite clear what would have been done if the case had been one of bankruptcy or insolvency in this country. The decision of Lord *Eldon* in *Benfield* v. *Solomons* (1) following that of Lord *Alvanley* in *Spragg* v. *Binkes* (2), shews that the application must have been to the Court of Bankruptcy or of Insolvency, the applicant offering a sufficient indemnity.

In this case the Plaintiff might have told the Court something about his position with respect to the foreign jurisdiction, and then have said, the Court can know no more. But he has very fairly told the Court that this judgment has been recovered, upon which he does not ask the Court to sit in appeal; that he took steps to set aside that judgment, which failed; and then that, upon the advice of a friend (whether he was the Governor of the colony or not is no matter), he took the benefit of the Act,

(1) 9 Ves. 84. (2) 5 Ves. 583.

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whereby the whole of his property was placed at the disposal of the Supreme Court of the colony, and vested in the assignee in insolvency.

But I must assume that this Court, and that all Courts abroad, have full and ample powers to do complete justice. In order to bring the case within the decision in *Troup* v. *Ricardo*, it must be shewn that the Plaintiff is remediless in the Courts of his own country. It is incumbent on him to shew that he cannot have justice in the Courts of ordinary jurisdiction in the colony, by obtaining leave, upon a proper application, to use the name of the assignee. It is said that cannot be done, because the assignee is not in the colony. But I have enough in the bill to shew me that that is very doubtful; and even if it were difficult to accomplish with the present assignee, I have nothing, upon the allegations of this bill, to shew me that it could not be done by changing the assignee. The averments of the bill are not sufficient to shew that the Plaintiff has not ample means for having justice done him by the Courts of the colony.

Upon the facts alleged, I must assume that the Defendant *Edwards* is assignee; but if he were not properly assignee, the case would be a little stronger in his favour, because he would not then be compellable to lend his name for the appeal, and would not be answerable in respect of his receipts in this Court.

The demurrer must be allowed.

Solicitors for the Plaintiff: Messrs. *Gibbs, Tucker, & Mackreth.*
Solicitors for the Defendant: Messrs. *Minet & Smith.*

EDWARDS *v.* WICKWAR.

V.-C. W.
1866
Jan. 13, 22.

Underlease—Attornment—Surrender.

A., in 1861, granted an underlease to *B.* for twenty-one years from Michaelmas, 1861, at the yearly rent of £50. In 1864 he granted an underlease of the same premises to *C.* for twenty-one years from Michaelmas, 1863, at the same rent. *B.* never attorned to *C.*:—

Held, inasmuch as there was no attornment, that the demise to *C.* did not pass the reversion to him, but only an *interesse termini;* and that in order to establish *C.*'s underlease, a surrender by *B.* to *A.*, and not to *C.*, was the effectual and proper course.

THE former hearing of this adjourned summons is reported *antè* p. 68.

A surrender to the vendors of *Palmer's* underlease had been obtained, but the purchaser still objected to complete, on the following grounds:—

It appeared that the underlease to *Palmer*, made by the vendors, the testator's trustees, was dated the 6th of September, 1861, and was for twenty-one years from Michaelmas, 1861, at the yearly rent of £50. The underlease of the same premises of the 1st of October, 1864, was made by the same trustees to *Thomas Kitson*, for twenty-one years, from Michaelmas, 1863, at the yearly rent of £50.

Mr. *C. Browne*, for the purchaser:—

The alleged surrender was made not to *Kitson*, the person entitled to the reversion in the premises, but to the lessors of *Palmer's* underlease.

As *Kitson's* lease was concurrent with *Palmer's*, but for a longer period, the surrender of *Palmer's* lease should have been made to *Kitson*. No surrender had thus been obtained, and the title was in a worse state than if the underlease had remained outstanding, the so-called surrender being nothing but an assignment of *Palmer's* underlease, so that the purchaser might find himself, at the suit of *Kitson*, liable to perform the covenants of *Palmer's* underlease, which were somewhat more stringent than those in

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Kitson's. The purchaser might even during the period of *Palmer's* lease be deprived of the receipt of all rent whatsoever.

Mr. *G. M. Giffard*, Q.C., and Mr. *W. Forster*, for the vendors, were not called upon.

Jan. 22. SIR W. PAGE WOOD, V.C., after stating how the question arose, continued:—

This state of circumstances leads to somewhat abstruse questions of estoppel and attornment, but the question seems to be decided by the fourth resolution in *Rawlyns's Case* (1).

It appears that there was no attornment by *Palmer* to the subsequent lessee, who is the present holder; and the decision in *Rawlyns's Case* shews that the underlease to the present holder was not a grant of a reversion at all. If *Palmer* had attorned, it would have been otherwise, and the reversion would have passed; but, being without attornment, it was nothing but an *interesse termini*, and the reversion remained in the lessors. Then, as between *Palmer* and his lessors, *Palmer* is estopped by his surrender, and the vendors have a right to say that, notwithstanding the lessors had passed their interest to *Palmer* at the time when they granted *Kitson's* underlease, inasmuch as *Palmer* never attorned to *Kitson*, the reversion remained in them, and there was nothing to prevent a surrender by *Palmer* to them; and then, as between the lessors and *Kitson*, there is established the relation of lessor and lessee, free from the possibility of any claim by or through *Palmer*.

I therefore hold this to be a good title, but the purchasers must have their costs of this hearing.

Solicitor for the Plaintiff: Mr. *Philips*.

Solicitors for the Defendants: Messrs. *Vallance & Vallance*.

(1) 4 Rep. 52a, 53a.

MOSELEY v. CRESSEY'S COMPANY.

V.-C. W.
1865
Dec. 19, 20.

Company—Deposit—Lien—Prospectus

The promoters of a company issued a prospectus stating that deposits would be returned if no allotment of shares was made. Several deposits were made, but no allotment ever took place:—

Held, that this statement did not bind moneys, consisting mainly of these deposits, standing in a bank to the credit of the company, with a trust or lien in favour of the depositors, as against creditors of the company; and demurrer allowed to a bill by depositors seeking to restrain creditors from attaching the moneys under a garnishee order.

A bill may be filed by depositors upon applications for shares in an abortive company, in which no allotment of shares has been made, on behalf of themselves and all the other depositors.

THIS was a demurrer to a bill filed by three Plaintiffs, on behalf of themselves and all other the persons who had paid deposits on their applications for shares in *Cressey's London and Burton Steam Cooperage Company, Limited*, against the company, the secretary, two other promoters who (with four other shareholders) had subscribed the memorandum of association, certain creditors of the company, and the company's bankers.

The demurring Defendants were two of the creditors, one a printer, the other an advertising agent, who had brought actions against the company in the Lord Mayor's Court, and threatened to attach the moneys of the company standing to their credit at the bank.

From the statements in the bill it appeared that in the early part of the year 1865 the Defendants, the three promoters, caused a prospectus to be issued in which was the following announcement:—

"Deposit, 10*s.* per share on application, and 30*s.* on allotment. No further call will be made without giving three months' notice, and not to exceed £2 per share. *Deposits returned if no allotment made.*"

The Plaintiffs applied for 20, 50, and 10 shares respectively, on which they paid deposits of £10, £25, and £5.

The bill alleged that no valid allotment of shares in the com-

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pany was ever made, and that "the greater part of the deposits paid by the Plaintiffs and others was paid into the company's bankers, and a considerable sum, consisting of such deposits, was now standing in the bank of the Defendants, the *European Bank*, to the credit of the said company. But the said deposits never belonged to or formed assets of the company, but were specially appropriated to a particular purpose in the event which happened; namely, if no allotment of shares in the company was made, they were to be returned to the persons who paid them. And such moneys were paid into the account of the company with their said bankers as a trust fund specifically applicable to the purpose aforesaid; and the same never belonged to the company, or to any of the seven persons who constituted the company."

That "part of the said deposits, amounting to about £80, was paid to the Defendant, the secretary of the company, to be held by him upon trust for the company if any allotment of shares was made, in which case the deposits would belong to the company, but to be returned to the persons who paid the same respectively in the event which happened of there being no such allotment;" and that the secretary ought to have retained the same moneys as a trust fund, and that he ought to repay and make good the same.

The relief prayed against the demurring Defendants was that they might be restrained from attaching the moneys standing in the bank.

Mr. *G. M. Giffard*, Q.C., and Mr. *Horsey*, for the demurrer:—

This is an ordinary instance of a deposit with a banker, establishing the simple relation of debtor and creditor. The undertaking that deposits would be returned if no allotments were made, did not mean that these actual moneys were to be returned.

Could it be argued that these promoters might go on employing printers and advertising agents, and yet the company incur no debts till the shares were allotted?

The Plaintiffs, as mere depositors, cannot represent all the other depositors; there being no common interest. The real relief sought is the dissolution of the company; then, how can the suit be for the benefit of all the depositors?

The following cases were cited: *Apperly* v. *Page* (1); *Mozley* v. *Alston* (2); *Jones* v. *Garcia Del Rio* (3); *Williams* v. *Salmond* (4).

Mr. *E. K. Karslake*, for the bill:—

It is clear that an action will lie by depositors against the promoters of an abortive company: *Nockels* v. *Crosby* (5); *Walstab* v. *Spottiswoode* (6); *Lindley* on Partnership, 725.

If that be so, and yet this bill does not lie, the absurdity would follow that promoters might collect depositors' money, pay it into a bank, and then, when an action was brought for money had and received, they being insolvent, nothing could be recovered from them, whilst the money was lying intact at the bankers.

The VICE-CHANCELLOR:—Your argument merely amounts to this—that it is very hard that seven men of straw should be permitted to contract debts.

Mr. *Karslake*:—The only assets of the company are the shares of the seven persons who alone constituted the company; and any one about to advance money has only to consult the register in order to ascertain that.

The Defendants can only succeed on one of two grounds. According to universal practice, moneys paid in by depositors are placed to an account to the credit of the company. The Plaintiffs must shew that that practice makes the money the property of the company. Or they must shew that that fact, in conjunction with others, gives them an equity. But there was no contract that this money should be the money of the company. The only contract was the prospectus.

No one but these seven promoters can touch this money, except by legal process. If the money has been earmarked at the bank to the wrong name, that circumstance does not destroy the equity of the true owners. There remains an equitable lien. Or if such equitable right does not exist, the whole practice of commercial men must be altered, and deposits must never again be paid in by promoters to the company's account at their bankers.

(1) 1 Ph. 779.
(2) 1 Ph. 790.
(3) T. & R. 297.
(4) 2 Jur. (N.S.) 251.
(5) 3 B. & C. 814.
(6) 15 M. & W. 501.

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The bank, no doubt, has no defence to a garnishee order; but if a trustee has trust property in his possession and refuses to assert his legal rights, any person, however remotely interested, may come to the Court, and compel him to assert his legal interest: *Foley* v. *Burnell* (1).

It is perfectly clear that the depositors could not be made answerable for the debts of the company, either by *scire facias*, or by winding up. That is the true test of their liability.

These Plaintiffs are entitled to sue on behalf of themselves and all other the depositors.

On this point he was stopped by the Court.

Mr. *Giffard*, in reply:—

The allegation as to the money being impressed with a trust is a conclusion of law, not a matter of fact.

There is nothing in the allegations of the bill to shew that the bankers knew anything of this alleged appropriation. Nothing would have amounted to effective appropriation, short of writing to the bank and telling them to set over the fund to a separate account.

SIR W. PAGE WOOD, V.C.:—

Upon this contention there appears to me to be no reasonable doubt.

Some promoters, as they are called, get up a company, and, among other strange courses taken, they think it consistent with right dealing to borrow the names of some gentlemen as directors, who also think it consistent with right dealing to lend their names for that purpose, under a private agreement that they shall not be answerable for any costs, charges, or expenses whatsoever for registration, solicitors' fees, or otherwise, up to the time when the shares shall be allotted and the business of the company commenced. That having been done, they issue a prospectus with these gentlemen's names on it, stating that more than half the shares had been already applied for, that the deposit was 10*s.* a share on application, and 30*s.* on allotment; and then follows this statement: "Deposit returned if no allotment made."

(1) 1 Bro. C. C. 274.

After that, the whole of the Plaintiffs' case is that, having seen this prospectus, they applied for shares and paid the deposits; that the greater part of the deposits were paid into the company's bankers to the credit of the company; and then that there was no allotment. The Plaintiffs say not only that these promoters are liable as for money had and received, but that they have no authority to deal with it otherwise than upon the trust by which it was to be returned to the depositors.

But if the object had been to create a lien of this kind, the obvious way of doing so would have been to have said in the prospectus that there would be a lien on the deposits until the company was established, or that it was to be set apart as a trust fund in the names of trustees, to be returned in the event of the company not being established.

Nothing of that kind was done; nor was that the contract. The contract was—"You are to pay so much per share when you apply for shares, and your deposits will be returned if no allotment is made"—not that the actual thing so deposited was to be paid back; for payment to the company's bankers to the account of the company made the moneys *ipso facto* part of the company's assets.

There are other persons to be considered besides the depositors—namely, creditors who supply their labour and goods to the company when it is registered, in the hope and expectation that they will be paid out of its assets. When they know there is a balance at the bankers' they furnish goods; but if they understand that the company has no credit at the bank, they do not trust it at all. These are persons with whom good faith is to be kept as much as with those who grasp at large profits by subscribing to the company because they think it is likely to succeed, and consider it not the less likely to do so because some deception has been practised upon the creditors also.

Then Mr. *Karslake* says that the directors would be placed in an absurd position if this bill does not lie. The answer to that is obvious—namely, that the directors have allowed the money to be paid to the credit of the company, thinking that course would be most convenient for the bank and for all parties; they being liable to an action for money had and received. The cases cited by

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Mr. *Karslake* shew that the Plaintiffs have a legal remedy for the return of their deposits. They paid their money on the faith that it should be returned if not required. Upon the faith of these payments the company gets credit, and people trust them. But, says Mr. *Karslake*, these moneys were not the moneys of the company until the Plaintiffs got their shares. But that is not so; they were not retained by the promoters, they were paid in to the credit of the company at their bankers. What was intended to have been done seems to have been done; and there was no trust created, it was merely a debt.

The only doubt I have felt upon the demurrer is in consequence of the averments in the bill that the moneys were paid in to the account of the company as a trust fund applicable to a specific purpose, and that they never belonged to the company. But Mr. *Karslake* very properly stated that these were not meant to be distinct and independent averments to the extent that the Plaintiffs said or did anything whatever when they paid in these moneys, or that the bank constituted themselves trustees; but that they are only to be taken in connection with the circumstances previously stated in the bill.

I ought not, therefore, to allow any difficulty of form to prevail; nor, if I find the existence of a trust averred as founded on the facts stated in the bill, to consider myself debarred from saying, "The Court has reviewed the facts stated, and finds that it is not the fact, as alleged, that this is a trust fund." If it was intended to be alleged that the fund was paid into the bank with the intention that it should be specifically applicable to a particular purpose, the bill should have stated, not merely that the moneys were paid in to the account of the company as a trust fund specifically applicable, &c., but also by whom the payment on such a trust was made. Then comes the intermediate sentence, that the moneys "never belonged to the company," followed by this, that they never belonged to the seven promoters themselves.

I must take it that the Plaintiff does not mean to allege anything contrary to the fact, but that these allegations must be held as simply meaning, what in truth they do mean, that under the circumstances alleged, the moneys were paid in on a specific trust,

&c., and upon that I must hold that the circumstances alleged do not establish any such trust.

The demurrer must be allowed.

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Solicitors for the Plaintiffs: Messrs. *James Taylor, Mason, & Taylor.*
Solicitors for the Defendants: Messrs. *Taylor, Mason, & King.*

MAIR v. HIMALAYA TEA COMPANY.

V.-C. W.
1865
Dec. 7.

Injunction—Agent—Personal Services.

The duties of the agent of a limited company being in the nature of personal service, and as such incapable of being enforced in equity, the Court refused to restrain the directors from acting upon or enforcing the resignation of *A*, whose management and agency was made a prominent condition in the prospectus on the formation of the company, and expressly provided for by the articles of association.

In refusing to grant the injunction, the Court put the directors upon an undertaking not to take advantage, in proceedings at law to recover the amount due on *A*'s shares, of his resignation, which was alleged by him to have been wholly conditional on his being relieved from all liability in respect of shares.

THIS was a motion for the purpose of restraining the Defendants, the *Himalaya Tea Company, Limited,* from appointing or retaining any person other than the Plaintiff's *Calcutta* firm of *Mair & Co.* as the agent of the Defendants (the firm of *Mair & Co.* being willing, and by the Plaintiff offering to act as the agents of the company in *India*), and also for the purpose of restraining the Defendants from consigning the produce of their estates to any persons other than the Plaintiff's *London* firm of *David K. Mair & Co.;* or alternatively, in case the Plaintiff should be held not entitled to the relief above sought (restraining any interference with his position as agent and consignee), then that the company might be restrained from further proceedings in an action at law to enforce certain share liabilities against the Plaintiff (alleged by him to be entirely dependent upon the permanency of his appointment as agent and consignee).

It appeared from the bill that the Plaintiff, Mr. *David K. Mair,* who had for many years carried on business in *London* and *Calcutta,*

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as a merchant and general commission agent, and been much engaged in superintending the cultivation of tea in the *East Indies*, entered into arrangements, in 1862, with certain persons for the formation of a limited company for the culture and manufacture of tea in the neighbourhood of *Darjeeling*, on the spurs of the *Himalayas*, under the agency and general management of his *Calcutta* firm of "*Mair & Co.*" A prospectus was issued stating the objects of the company, and calling attention prominently to the appointment of *Mair & Co.* as managers of the estates, and to their long experience in the cultivation of tea. The prospectus was accompanied by a letter stating the proposed appointment of *Mair & Co.* of *Calcutta*, as agents, at a salary of 400 Rs. per month, and of *David K. Mair & Co.*, as secretaries in *England*, at £300 a-year, and if it should be considered advisable, as consignees, with the annual merchants' commission. The articles of association, which were issued on the formation of the company in November, 1862, recited an agreement that one-fifth of the shares should be allotted to and accepted by the Plaintiff upon certain conditions, deferring payment by him of the calls upon his shares, but providing for payment of interest at 5 per cent. on all principal moneys which would have been payable by him in respect of the shares allotted to him. The management of the business was vested in the directors, who were empowered to appoint, employ, and remove all such managers, secretaries, clerks, agents, and other officers of the company as they might think necessary. It was also provided by the articles of association (s. 93), that the directors might at any time appoint any person they might think fit, whether qualified or not to be a director, to act as manager or managing director upon such terms, and with such powers, and at such salary, &c., &c., provided always that such manager or managing agent should at all times, and for any cause be removable by the directors, either with or without the passing of a special resolution at a general meeting as might have been agreed upon between him and the directors; and if no such agreement should have been made, then by the directors of their own authority (s. 95), provided that *Mair & Co.* of *Calcutta* should be agents of the company in *India*, and should be paid as a remuneration for their services 400 Rs. a month, or at their option, a commission

of 5 per cent. upon the produce of the estate—they providing clerks, offices, and paying office expenses. If it should be considered by the directors advisable that the produce of the estate be sold in *England*, such produce was to be consigned to *David K. Mair & Co.*, who should be entitled to the usual merchants' commission in respect thereof.

From January, 1863, when he left *England*, until July, 1865, the Plaintiff and his firm continued to act as agents and general managers of the affairs of the company in *India*. On his return to *England*, in July last, the Plaintiff was urged by some of the directors to resign his agency and management; and as an inducement to do so he was assured by Mr. *Bazley*, one of the directors, that he should be relieved from all claims of the company against him in respect of the shares agreed to be taken by him, and from payment of interest, on his consenting, on the other hand, to relinquish all claims to shares in the company. The bill stated that the Plaintiff, under the pressure put upon him by the directors, and on the terms of being relieved from all liability whatsoever in respect of his shares, tendered his resignation. Shortly afterwards he received an application for payment of the amount due upon his shares, and also of interest, and was at the same time informed that the proposal of Mr. *Bazley* was one which the directors were not entitled legally to make. The Plaintiff insisted that he had only taken so large a number of shares in the company on the terms of having the management intrusted to him, and that his consent to resign was expressly conditional upon his being relieved from all liabilities to which he might be subject under the articles of association. The directors, however, took a different view, and had not only appointed a new manager and agent in the room of the Plaintiff and his firms whom they declined any longer to recognize as their agents in *India*, or consignees in this country, but had commenced an action against him for the amount due upon his shares and interest. A resolution had also been recently passed by the Board of Directors, calling upon the Plaintiff (as a step alleged to have been rendered necessary for the protection of the interests of the other shareholders in consequence of the depreciation of the shares), to pay a call of £12 10*s.* per share within a month, and proceedings

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for the purpose of enforcing such call were threatened. Under these circumstances the Plaintiff had filed his bill for relief by way of account in respect of all dealings and transactions between his *London* and *Calcutta* firms and the company, and by injunction to restrain the company from acting upon and enforcing the voluntary resignation, or alternatively, in case the Plaintiff could not be reinstated in his former position, that the company might be restrained from proceeding in the action at law to enforce payment upon the shares accepted by the Plaintiff.

Mr. *G. M. Giffard*, Q.C., and Mr. *H. Fox Bristowe*, on behalf of the Plaintiff in support of the motion, contended that the company were not entitled to treat the Plaintiff as dismissed from his agency, and at the same time to sue him on the shares, which were accepted and held by him conditionally upon his appointment being made permanent. If he were retained in his agency, then the Plaintiff would consent at once to pay the amount due in respect of interest, pursuant to the articles of association; and, in any case, such amount ought not to be handed over to the Defendants, but should be made to abide the decision of the Court on the question whether or not the company had power to determine the agency. It was submitted that the company had no such power, and that, looking at the prospectus, in which the object of the company was stated to be "the culture and manufacture of tea in *India*, under the agency and management of *Mair & Co.*," and the articles of association, any attempt to dismiss the Plaintiff, unless by the authority of a general meeting, was *ultra vires*, and equivalent to a cancelling of part of the articles of association: (*The Companies Act*, 1862, s. 49.) If the Defendants relied upon the resignation as being the voluntary act of the Plaintiff, such resignation was expressly conditional, and the Defendants ought to be restrained from breaking their part of the arrangement by suing the Plaintiff upon the shares formerly held by him.

Mr. *Roll*, Q.C., and Mr. *Archibald Smith*, for the Defendants, were not called upon.

SIR W. PAGE WOOD, V.C.:—

I cannot see my way to granting the Plaintiff the relief asked,

the whole matter being one for a Court of law to deal with, so long as care is taken that the Plaintiff shall not be prejudiced in the proceedings at law by his voluntary resignation. The contract between the Plaintiff and the company must be regulated by the articles of association only, on the faith of which other persons have incurred their liability, and the Court cannot enter into any arrangements antecedent to the articles. Even assuming, in favour of the Plaintiff, the construction given by him to the articles that he was to be irremovable, except by the authority of a general meeting, or that his acceptance of shares was conditional on his being retained as agent, the Court cannot act in his favour, as the duties of an agent are in the nature of personal service, and as such incapable of being enforced in equity: *Johnson* v. *The Shrewsbury & Birmingham Railway Company* (1). The Plaintiff will have his cross action in respect of the contract; and as he cannot be relieved by this Court, there will be no order upon the present motion. As, however, the Plaintiff has some reason for saying that his resignation was given under the impression that he would be thereupon relieved from all liability, the Defendants must undertake not to set up in any proceedings at law the alleged resignation of the Plaintiff.

Solicitors for the Plaintiff: Messrs. *Tamplin & Tayler.*

Solicitors for the Defendant: Messrs. *Howard, Dollman, & Co.*

(1) 3 D. M. & G. 914, &c.

V.-C. W.
1866
Jan. 27.

In re LAING'S TRUSTS.

Leases and Sales of Settled Estates Acts (19 & 20 *Vict. c.* 120, *s.* 1; 21 & 22 *Vict. c.* 77, *s.* 1)—*Settled Estate.*

Testator devised his real estate, and bequeathed the residue of his personal estate to trustees, upon trust, at their discretion, to sell the real estate and convert the personalty, and invest the proceeds, and to pay the income to his wife, during her life or widowhood, for the maintenance of his children during their minorities; and upon the death or marriage of his wife the fund and the income thereof were to be in trust for his children absolutely, in equal shares, as tenants in common.

Held, that, as the period of sale was discretionary, and as the rents until sale must by implication go as the income of the proceeds of sale was directed to be applied, this was a settled estate within the meaning of the above Acts.

THIS was a Petition under the *Leases and Sales of Settled Estates Acts.*

John Laing, by his will dated the 24th day of August, 1852, devised all his real estate, if any, and bequeathed all the residue of his personal estate, to two trustees, their heirs, executors, administrators, and assigns respectively, in trust, at their discretion to sell his said real estate, &c., and to sell and convert into money his said residuary personal estate, and to stand possessed of the moneys to arise from the sale and conversion of the said real and personal estate, in trust to invest the same, &c., and to stand and be possessed of the interest, dividends, and annual proceeds, &c., in trust, to pay the same to his said wife, during her life or widowhood, for the maintenance of herself and the testator's children during their respective minorities; and upon the death or marriage of his said wife, which should first happen, then the stocks, funds, and securities, the produce of his said real estate and residuary personal estate, and the interest, dividends, and annual proceeds thereof, should be in trust for his children, if more than one, or his child, if only one, who should live to attain the age of twenty-one years, or marry; and if more than one, in equal shares as tenants in common. The will contained powers of maintenance, education, and advancement, but no power of leasing.

The testator died on the 28th of May, 1863. Subsequently to the date of his will he had purchased two freehold houses, numbered 164 and 165, *Western Road, Brighton*, where he carried on the business of a linendraper, and a piece of freehold land at *Keymer, Sussex.*

Neither of the trustees ever acted in the trusts of the will. One of them renounced the executorship, and disclaimed the trusts by deed; and the other was, at the death of the testator, and still was, out of the jurisdiction. He never disclaimed.

The widow, and sole acting executrix of the testator, was desirous of leasing the above premises, and this Petition was presented by the five infant children of the testator, by their guardian, and two proposed new trustees, praying for the appointment of new trustees, and that power to grant a lease for twenty-one years of the above property might be vested in such trustees.

The only question was whether the above was a "settled estate" within the meaning of the *Leases and Sales of Settled Estates Acts.*.

Mr. *T. C. Renshaw*, for the Petitioner, cited *In re Greene* (1).

SIR W. PAGE WOOD, V.C.:—

Inasmuch as by implication the rents of the property until it is sold must go in the same way as the income of the property is directed to go when sold, and particularly as the testator has given to the trustees a discretion as to the time of sale, I am of opinion that this is a settled estate within the meaning of the Acts.

Solicitor: Mr. *William Clarke.*

(1) 10 Jur. (N. S.) 1098.

V.-C. K.

1866

Jan. 12, 13.

EDMUNDS *v.* WAUGH.

Statute of Limitations—3 & 4 *Wm.* 4, *c.* 27, *s.* 42—*Suit to recover Interest.*

The proceeds of sale of mortgaged premises, sold under the power of sale in a mortgage deed by the trustees of the mortgagee, were paid into Court in a suit for the administration of the mortgagee's estate; and there being nearly twenty years' arrears of interest due on the mortgage, exceeding in amount the fund in Court, the trustees petitioned for payment out of the fund to satisfy such arrears, and the assignee of the mortgagor was served with the Petition:—

Held, that the Petition was not a suit to recover arrears of interest within the 42nd section of the statute, 3 & 4 Wm. 4, c. 27; and, therefore, that the mortgagee's trustees were entitled to more than six years' arrears of interest, and the fund was ordered to be paid over to them.

The decision in *Mason* v. *Broadbent* (1) questioned.

THE question in this case was whether, having regard to the 42nd section of the 3 & 4 Wm. 4, c. 27, the trustees of a mortgagee were entitled to more than six years' arrears of interest under the following circumstances:—

By an indenture of mortgage dated in 1833 certain premises were mortgaged to secure a sum of £1100 and interest at 5 per cent. This mortgage deed contained a covenant to pay principal money and interest thereby secured, and a power of sale in default of payment; and upon any such sale under the power it was declared that the mortgagee should stand possessed of the moneys upon trust to reimburse himself costs, charges, and expenses, and retain or pay the principal money and all interest due for the same, and to pay the residue to the persons for the time being entitled to the equity of redemption, in case the same premises had not been sold.

The mortgaged premises ultimately became vested, under an indenture dated in 1846, in *George Waugh*; and in 1844 *Lewis Buckle Bartholomew*, who, in the events which had happened, was the mortgagor, became insolvent.

George Waugh died in 1856, and the above suit was instituted to administer his estate. In 1860 the trustees and executors of *George Waugh* sold the mortgaged premises under their power of

(1) 33 Beav. 296.

sale, and the purchase-money was paid into Court, and, with the exception of £250, distributed among the parties entitled. The £250, being the fund now in question, was carried to a separate account in the cause entitled "The Plaintiff's contingent liability account in respect of *Lewis Buckle Bartholomew's* mortgage," to answer any claim by the mortgagor or his assignee in insolvency.

No interest had been paid for nearly twenty years, and there being now due for principal and interest a sum exceeding the £250 in Court, the trustees petitioned for a transfer to the general credit of the cause of that fund. The Petition was served on the assignee in insolvency of the mortgagor, and the question raised was whether, under the *Statute of Limitations*, the mortgagee's trustees were entitled to more than six years' arrears of interest.

Mr. *Swanston*, in support of the Petition, claimed the whole of the arrears of interest due.

Mr. *Cutler*, for the assignee of the mortgagor, contended that the fund being in Court could not be got out by the mortgagees without a Petition, which was in effect a suit by which arrears of interest were sought to be recovered within the meaning of the 42nd section of the statute 3 & 4 Wm. 4, c. 27, and therefore that the mortgagee's trustees were entitled to arrears of interest for six years only. He referred to *Mason* v. *Broadbent* (1), where, in a suit by mortgagor to recover surplus money, the Master of the Rolls held that six years' interest only could be retained.

Mr. *H. Lewis* appeared for the insolvent; but the Vice-Chancellor said that the insolvency being still pending, the Court could not recognise the insolvent as having any interest in the subject-matter of the Petition, and his counsel could not be heard.

Various other points were raised in argument, and authorities cited; but it is not necessary, in the view which the Court took of the case on the first point, to refer to them.

SIR R. T. KINDERSLEY, V.C.:—

As I am clearly of opinion in favour of the mortgagee on the first point, that this is not a suit to recover interest under the

(1) 33 Beav. 296.

V.-C. K. 1866 EDMUNDS v. WAUGH.

42nd section, it is not necessary to consider the effect of the numerous cases which have been referred to on the other points.

[His Honour read the section.]

The question is whether the proceeding now before me is a suit to recover interest within the reasonable meaning of that term as used in this section.

If there had been no suit, and the money had remained in the hands of the mortgagees, they would have been entitled to retain out of it the principal money, and all the interest they claimed; and the mortgagor could only have got any part of it out of their hands by filing a bill to compel repayment to him of the surplus money.

I do not mean to express any opinion on the point whether, on any such proceedings as those in *Mason* v. *Broadbent* (1), the mortgagee would be entitled to interest for six years only, or to the whole interest. Assuming that he would be entitled to six years' interest only, the state of things here is, that, there being a suit to administer the estate of the mortgagee, the money was paid into Court in that suit. Does the fact of the money being in Court vary the rights of the parties?

The money, after being brought into Court, was distributed among the persons entitled, except the £250 now in question, which was set aside to indemnify the trustees from any claims on the part of the mortgagor or his assignee. But that fund is in the hands of the Court, not as belonging to the mortgagor, but it still is constructively, as between the mortgagor and mortgagee, in the hands of the mortgagee; and the present Petition seeks to have this money dealt with according to the rights of the parties, and the mortgagor's assignee was served in order that he might make any claim he thought fit. It appears to me that the highest ground that the assignee can take is to ask to be regarded as coming to recover the surplus money, and insisting upon only six years' interest being retained by the mortgagee. Assuming that to have been the case, such a suit could not be regarded as one to recover interest, as a suit to recover interest would necessarily be instituted by the person entitled to the interest, that is, the mortgagee.

(1) 33 Beav. 296.

In the case of *Mason* v. *Broadbent* (1), which was a suit by a mortgagor to recover the surplus money, the decision appears to have been that the mortgagee should only retain six years' arrears of interest. It appears to me, however, that the attention of the Master of the Rolls was not by the argument specifically called to the precise terms of the 42nd section, and his Lordship seems to have assumed that if it had been a bill for redemption the mortgagee would only have been entitled to six years' arrears of interest, and to have considered that the case before him must be regarded as if it had been such a suit. I am bound to say that, with all deference, I cannot concur in the conclusion that a bill by a mortgagor to recover the surplus money comes within the terms of the 42nd section as being a suit by which arrears of interest are sought to be recovered.

Moreover, it does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act taking away existing rights, and which must be construed with reasonable strictness. The intention of the Legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then come to a court of justice to recover the interest, he should only be entitled to recover six years' interest; but it does not follow that the Legislature intended that a mortgagor who has lost his legal right, and comes to the Court insisting on his equity to redeem, should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute. Is the omission of the mortgagor to pay the interest which he ought to have paid less culpable than the omission of the mortgagee to demand and enforce payment of it?

I must hold that the mortgagee is entitled to all the interest which has not been paid.

Costs of the Petition out of the fund.

Solicitor for the Petitioner: Mr. *Marshall.*

(1) 33 Beav. 296.

V.-C. K.
1866
Jan. 12.

HAYNES *v.* BARTON.

Costs—Lands Clauses Consolidation Act, 1845—*Confirmation of Contract—Lands subject to Suit.*

Where a railway company takes land which is the subject-matter of a suit, and it becomes necessary to serve the parties to the suit with a Petition occasioned by the land being so taken, all the costs of such parties, including the cost of their appearance, must be paid by the company.

THIS was a Petition by trustees, for confirmation by the Court of a contract entered into by them for the sale of a piece of land, at *Hendon*, to the *Midland Railway Company*, which was required for the purposes of the railway. Owing to the land in question being the subject-matter of the above suit, the tenants for life, who were parties to the suit, had necessarily been served with the Petition.

Mr. *W. Morris*, for the Petition.

Mr. *F. Harrison*, for the tenants for life, who were parties to the suit, asked for their costs.

Mr. *Sargent*, for the railway company, admitted their liability to pay the costs occasioned by the service of the Petition, but relying on *Sidney* v. *Wilmer* (No. 2.) (1), contended that the railway company were not bound to pay the expense of their appearance.

SIR R. T. KINDERSLEY, V.C.:—

I adhere to the rule I laid down in *Haynes* v. *Barton* (2), that where a railway company takes land which is the subject-matter of a suit, and in consequence of the existence of such suit it is necessary to serve the parties to the suit, the railway company must pay all the expenses occasioned thereby. The railway company must therefore pay the costs of the parties served, including the costs of their appearance.

Solicitor for the Petitioners: Mr. *Barton*.

(1) 31 Beav. 338.

(2) 1 Drew & Sm. 483

HUME *v.* POCOCK.

V.-C. S.
1865
Dec. 8, 9, 11.

Specific Performance—Stipulation as to Title—Evidence.

On a bill for specific performance of an agreement to purchase certain lands, "the Plaintiff only to produce a title from his vendor;" it appearing that Plaintiff at the instance of the Defendant had purchased all the estate, right, title, and interest in the said lands from one of four reputed owners, the Court held that Defendant was not at liberty to show *aliunde* that Plaintiff's vendor had no title, and decreed specific performance of the agreement.

THIS was a bill for specific performance of an agreement. During the year 1858, the Defendant *Pocock* with one *Kingdon* were engaged in promoting a bill in Parliament for the purpose of embanking and reclaiming certain mudlands near *Chichester* harbour. The bill was thrown out in that year, but was again, under authority reserved, brought forward in 1859.

Lord *Fitzhardinge*, then Sir *Maurice F. F. Berkley*, as lord of the manor and hundred of *Bosham*, claimed to be entitled to certain waste lands in *Thorney*, which the proposed bill sought to embank and reclaim. In the book of reference, deposited previously to the application, the waste lands were numbered 25, and were described as shore mudlands and creeks, and the reputed owners were stated to be Sir *M. F. F. Berkley*, claiming to be lord paramount of the hundred of *Bosham*; *F. Padwick*, Sir *C. Taylor*, Bart., claiming to be lords of the manor of *West Thorney*, *Thorney Beckley*, and *Thorney Aglands*; the Lords Commissioners of the Admiralty, the Crown, and Commissioners of Woods and Forests.

On the renewal of the application to Parliament in 1859, Sir *M. F. F. Berkley* threatened to oppose the bill, and presented a Petition to Parliament for that purpose. In this state of things, Mr. *Kingdon*, one of the joint promoters of the bill, proposed to the Plaintiff to purchase Sir *M. F. F. Berkley's* estate and interest in the land; and it was ultimately agreed that, if the negotiations were successful, the promoters would purchase the estate and interests from the Plaintiff at an advanced price, the difference in price being a consideration to the Plaintiff for his trouble. The Plaintiff acceded to the proposal, and on the 2nd of June, 1859, an

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agreement was entered into between him and Sir *M. F. F. Berkley*, which was to the following effect:—

"That Sir *M. F. F. Berkley* will withdraw his opposition to the bill.

"That the Plaintiff shall pay Sir *M. F. F. Berkley* £2000, as compensation for his interest in the lands to be enclosed, within two years, with interest from the passing of the bill; such sum to be a charge on the land; but that if the bill do not pass, the agreement to be void.

"That Sir *M. F. F. Berkley* shall not be called on to produce any title to the lands, except his father's will, whose right over them shall be admitted."

On the 3rd of June, 1859, the agreement now sought to be specifically performed was entered into between the Plaintiff of the one part, and *Kingdon* and *Pocock* of the other part, and was as follows:—

"Whereas Admiral *Berkley*, by certain grants from the Crown, is lord of the hundred and manor of *Bosham, Sussex*: And whereas *Kingdon* and *Pocock* applied last session for an Act to enable them to enclose and reclaim part of the lands situate in *Chichester Harbour*, and part of which lands are within the said hundred, and comprise the lands between high and low water mark: And whereas the Lords of the Admiralty caused a report to be made that the said Act should not be granted; and, in consequence, by the sudden termination of the last session of Parliament, the said Act was stopped, and the right of the undertakers to proceed therewith in the present session reserved: And whereas the said *R. Hume* hath agreed with the said Sir *M. F. F. Berkley* for the purchase of all his estate, right, title, and interest in the mudlands or lands within the said hundred between high and low water mark, except such part as lies in *Bosham Creek*. Now, the said *R. Hume* doth hereby agree with *Kingdon* and *Pocock* that he, *Hume*, shall and will sell to *Kingdon* and *Pocock*, all his estate, right, and interest in all such parts of the said lands between high and low water mark as are within the hundred of *Bosham*, and are included in the lands proposed to be redeemed and embanked under the provisions of the intended Act of Parliament, at the sum of £3050: And *Kingdon* and *Pocock* do hereby agree with *Hume* that, in the

event of the Act being obtained, they will purchase all the said lands at the sum of £3050: And it is agreed that the said purchase shall be completed within two years from the passing of the Act, and that the sum of £3050 shall bear interest at the rate of £5 per cent. from the 9th of April last; *that the said Hume shall be called upon to produce only the title from Admiral Berkley to himself;* that such sum of £3050 and interest shall be a charge upon the land to be enclosed; that in the event of the bill not passing into an Act of Parliament, this agreement shall be void."

The two agreements of the 2nd and 3rd of June, 1859, were brought to the Plaintiff ready prepared by a Mr. *Padwick*, on behalf of *Kingdon*, and were executed by the Plaintiff at his instance. *Padwick* appeared to have acted as agent for all parties. The Plaintiff was applied to in consequence of Lord *Fitzhardinge* having declined to treat with *Pocock* and *Kingdon*.

Lord *Fitzhardinge* having withdrawn his opposition, the bill passed; *Kingdon*, *Pocock*, and one *Bird*, were named as undertakers in the Act, but the whole interest subsequently became vested in the Defendant *Pocock*. By an Act passed in 1864, the time for the execution of the works was extended to the 19th of August, 1867.

The Defendant took no steps till 1864 to reclaim the said lands, but in that year he commenced operations, and drove piles into the said lands. The Defendant having refused to perform the agreement, on the 25th of October, 1864, this bill was filed, and an injunction applied for, but refused by his Honour.

The bill prayed for specific performance of the agreement, and for an account of what was due to the Plaintiff for principal and interest; that on the amount being ascertained, payment might be decreed; and, in default, that the Defendant might be restrained from exercising acts of ownership; that, until payment, the principal and interest might be declared a charge on the said lands; that if specific performance could not be decreed, damages might be awarded, and assessed in such manner as the Court should direct.

There was a great deal of evidence on the part of the Plaintiff to shew that Lord *Fitzhardinge's* claim was *bonâ fide*, and that the Defendant knew that there were conflicting claims to the lands in

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question. Mr. *Kingdon*, in the 3rd paragraph of his affidavit, stated that, "previously to the application to Parliament for the said Act, and long before I communicated with Mr. *Padwick*, as agent for Lord *Fitzhardinge*, I caused the inquiries to be made referred to in the 5th paragraph of the Defendant's answer, and from those inquiries became satisfied, and fully believed, that Sir *M. F. F. Berkley*, as lord paramount of the manor of *Bosham*, was the owner of some portion of the mudlands intended to be reclaimed, or of the lands adjacent thereto, and I accordingly caused his name to be inserted in the book of reference, and was prepared to treat with him as owner." *Kingdon*, in his evidence, further stated that he had assigned his interest under the Act to *Pocock*, on the footing that the contract with the Plaintiff was to be performed.

The Plaintiff also relied on a letter from *Kingdon* to *Padwick*, previous to the agreement set out in *Pocock's* answer, where *Kingdon* described Sir *M. F. F. Berkley's* title "as very shaky, indeed," as shewing that the Defendant was aware that the title had been impugned.

The case made by the answer was that what the Defendant agreed to purchase were the mudlands vested in Admiral *Berkley*, and the Defendant submitted that he was not by the agreement precluded from shewing *aliunde* that Sir *M. F. F. Berkley*, now Lord *Fitzhardinge*, had no estate, title, or interest in the said lands. The Defendant further submitted that, even if the Court should be against him on that point, the specific performance of the agreement ought not to be decreed, as the agreement was procured by the representations of *Padwick* that Lord *Fitzhardinge* was absolutely entitled to all the waste lands in *Chidham* and *Thorney*. The answer further stated, that there were no rights to waste lands in the manor of *Chidham*, and that as to the manor of *Thorney*, it and every proper right or interest appurtenant thereto was, in February, 1836, conveyed by Lord *Fitzhardinge* to a Mr. *Lyme*, and by his representatives conveyed to Sir *Charles Taylor*.

There was a great deal of evidence adduced on the part of the Defendant to shew that Lord *Fitzhardinge* had no interest in the said mudlands; but his Honour *held* the Defendant was precluded by the agreement from going into that case.

Mr. *Malins*, Q.C., and Mr. *Fry*, for the Plaintiff, relied on the agreement, and contended that the Plaintiff was only bound to produce a conveyance from Lord *Fitzhardinge* to the Plaintiff. This would be conclusive in any case, but here the Defendant entered into the contract with full knowledge that Lord *Fitzhardinge's* title was "very shaky," as appeared from *Kingdon's* evidence.

Mr. *Bacon*, Q.C., and Mr. *Macnaghten*, for the Defendant:—

There are two grounds on which this bill must be dismissed with costs. First, that this agreement was obtained by the fraudulent misrepresentations made by *Padwick*. Secondly, on the construction of the agreement.

On the first point they referred to the evidence, which they contended made out the case of misrepresentation and fraud, and insisted that the opposition in Parliament was part of the same proceeding.

On the second point they submitted that the evidence shewed that Lord *Fitzhardinge* had no title whatever to the lands in question. If Lord *Fitzhardinge* had no lands to sell, there was nothing on which the agreement could operate. That there were no mudlands within the hundred of *Bosham*, appeared from the evidence of the Hundred Rolls.

Mr. *Malins* objected to this evidence, which he contended was excluded by the agreement.

The VICE-CHANCELLOR:—This evidence cannot be admitted, because, by the terms of the agreement, you are precluded from impeaching Lord *Fitzhardinge's* title.

Mr. *Bacon*, Q.C., and Mr. *Macnaghten*:—

Notwithstanding the stipulation relied on, we are at liberty to shew that, unless Lord *Fitzhardinge* has some interest, the Plaintiff cannot have specific performance. This is not a case like *Freme* v. *Wright* (1), because in that case the condition was that the purchasers should have an assignment of the bankrupt's interest under such title as he lately held; but here the condition was

(1) 4 Madd. 364.

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nearly identical with that in *Shepherd* v. *Keatley* (1). In that case the condition was that the vendor should not be obliged to produce the lessor's title, but the vendee, having *aliunde* discovered a defect, was held entitled to insist on the objection. That decision really covered the present case. The only distinction between the two was that in the reported case the words were "shall not be obliged to produce," whereas here the words were "shall be called on to produce only," but in principle the cases could not be distinguished. See also *Dart*, V. & P. (2), *Darlington* v. *Hamilton* (3), *Warren* v. *Richardson* (4).

The Plaintiff, if specific performance is refused, may try his rights in a court of law, which is the proper tribunal. Assuming what is but feebly denied, that Lord *Fitzhardinge* has no title, the Plaintiff's claim, if any, is a mere money demand, to pay money for personal services, the proper remedy for which would be damages at law for breach of contract.

Again, this contract is, at all events, ambiguous, and on that ground alone will not be enforced in this Court: *Harnett* v. *Yielding* (5). In that case Lord *Redesdale* said (6):—"One ground on which Courts of Equity refuse to enforce specific execution of agreements is when, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged." It was, to say the least of it, very doubtful whether the Defendant ever meant to contract to pay £3050 in return for nothing. Lastly, this is not such a contract as this Court will perform, it being on the face of it an unrighteous claim.

SIR JOHN STUART, V.C.:—

It has been contended that the Plaintiff has no title to the estate, and that, having no title, he cannot perform his part of the agreement.

There is no doubt that, in contracts for the sale and purchase of property, the terms of the contract must be clear, in order that the Court may see how far the subject-matter of the purchase can be given by the party who contracts to sell to him who contracts to

(1) 1 C. M. & R. 117.
(2) 3rd ed. p. 98.
(3) 1 Kay, 550.
(4) 1 Y. Ex. 1.
(5) 2 Sch. & Lef. 549.
(6) *Ibid*, 554.

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buy. But the owner of a disputed title may make a valid contract for the sale of that title, such as it may be. No doubt, with reference to the terms of a contract, it is implied that the purchaser is to have an indefeasible title; and although the vendor may have entered into a contract that he shall not be bound to produce a title, yet the terms of the contract may be such, that if it appears *aliunde* that he has no title, and can therefore give the purchaser nothing, the Court in such a case would not make a decree for specific performance. The meaning of specific performance is, that there shall be conveyed what the vendor has contracted to sell to the purchaser.

The case now before the Court is that of a contract for the purchase of property, as to which both contracting parties knew there were four claimants. The circumstances, however, under which the contract was entered into were extraordinary. Evidence upon that subject has been entered into by both parties. The Defendant, who is the purchaser, was engaged in an attempt to obtain from the Legislature an Act of Parliament to enclose certain mudlands. Pursuant to the requisitions of the Legislature, he was bound to tell who were the owners or reputed owners of the lands in question, and four names were given by him as being the owners or reputed owners, and of these that of Lord *Fitzhardinge*, under whom the Plaintiff claims, was one. The Crown was another of the four claimants. In that state of things the agreement in question was entered into.

One of the difficulties in the Defendant's case is, that *Kingdon*, a contractor, and an active party in the contract, is an important witness on behalf of the Plaintiff. In his evidence he states, "that previously to the application being made to Parliament for the Act, and long before I communicated with *Padwick*, as the agent of Lord *Fitzhardinge*, I caused inquiries to be made, and, from those inquiries, I became satisfied, and fully believed, that Lord *Fitzhardinge* was lord paramount."

It has been argued that *Padwick* was the only source of the information which induced the Defendant to give the names of the four claimants. But the Defendant *Pocock* in his answer states that, previously to the application, he had been informed that these names had been inserted in the books of reference.

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In this state of things, it is obviously an important matter for the person applying for an Act of Parliament, under the circumstances in which the Defendant was situated, to get rid of these claimants. The agreement in question was entered into for that purpose, and with the knowledge upon the part of the contracting parties that there were four claimants of the property in question. The agreement, under these circumstances, recites that Lord *Fitzhardinge* was lord of the manor and hundred of *Bosham;* that *Kingdon* and *Pocock*—parties of the other part of the contract—purchasers, had applied for an Act of Parliament for enclosing the lands within the said hundred; and it recites that the Act had not been passed, by reason of the sudden termination of the session, and then that *Hume* had agreed with Lord *Fitzhardinge* to purchase his right and interest in the lands in question; and after all that, the Plaintiff *Hume*, by this memorandum, agrees with *Kingdon* and *Pocock* to sell to *Pocock* for £3050, and then comes the important provision that *Hume* shall be called on to produce only the title from Lord *Fitzhardinge* to himself.

Looking at all the circumstances under which this agreement was entered into, the relative situations of the contracting parties, and also the terms of the agreement, they exactly fit the case of a bargain with one of several claimants for his interest in the lands in question. The stipulation that the Plaintiff shall only be bound to produce a title from Lord *Fitzhardinge* seems to me conclusive upon the question as to his only being bound to shew a title from him; and also that if any of the other claimants should be entitled, that circumstance cannot alter the terms of the contract. Besides, under the Act of Parliament, from the time it passed all objection was gone, for it gave compulsory power to acquire possession of the lands. That possession has been acquired and enjoyed; but now it is said that it was not acquired from Lord *Fitzhardinge*, he not being entitled, but from somebody else, although I do not know where that appears in evidence.

From the statement of the Defendant himself, it appears that he has got the property. *Pocock* says, "I allege that the Crown or Sir *F. Taylor*, &c., is entitled to the waste," but he will not say through whom he acquired a title.

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This is a case of a contract made under such circumstances as plainly shew that the object was to get a title, such as it was, and it was an integral part of it that the vendor was bound to produce only a conveyance from Lord *Fitzhardinge* to himself [his Honour then considered the evidence which, it was said, supported the charge of fraud, and said that it wholly failed to make out a case of fraud or bad faith, and continued as follows]:—So that, putting the whole of the circumstances together, this is a very different case from *Shepherd* v. *Keatley* (1), and cases of that kind; and looking at the circumstances under which the contract was entered into, and the position of the contracting parties, and the knowledge they all possessed, and the subject-matter, it is a case in which the Plaintiff *Hume* is entitled to a decree.

MINUTES:—Declare that the agreement of the 3rd of June, 1859, ought to be specifically performed and carried into execution, provided that a good title can be made to the said lands, having regard to the declaration next hereinafter contained, and order and decree the same accordingly. Declare that upon the true construction of the said agreement the Plaintiff is not to be called upon to shew any other title to the said lands than that from the said Lord *Fitzhardinge* to the Plaintiff. Inquire whether a good title can be made to the said lands, having regard to the liberty to apply.

Solicitors for the Plaintiff: Messrs. *Baxter, Rose, Norton, & Co.*

Solicitors for the Defendant: Messrs. *Chilton, Burton, Yeats, & Hart.*

In re NEWBERY.

V.-C. S.
1865
Dec. 19.

Infant—Religious Education—Plymouth Brethren.

The father, a beneficed clergyman of the Church of *England*, having appointed a minister of the same church, conjointly with his widow, guardians of his children, the widow, after her husband's death, attached herself to the *Plymouth Brethren*, and with the infants frequented their meeting-house. The Court, on the application of the other guardian, ordered the children to be educated in the principles of the Church of *England*, and restrained their attendance at the meeting-house of the dissenting body.

In directing the religious education of its wards the Court will have regard to the religious views of the father where they are not immoral or dangerous.

THE question raised in this case came on upon a summons adjourned into Court, on the part of two infants, a boy aged fifteen, and

(1) 1 C. M. & R. 117.

V.-C. S. 1865 *In re* Newbery.

a girl aged twelve, by their next friend, the Rev. *Harry Caddell*, that £400 might be expended in their education and maintenance, and that directions might be given for the maintenance and education of the infants. The facts as set forth in the affidavits were briefly these:—The father of the children, the Rev. *Thomas Newbery*, of *Hinton St. George, Somerset*, was the son of Methodist parents, and was educated as a Methodist, but subsequently was ordained as a clergyman of the Church, and became rector of the parishes of *Leavington* and *St. Michael-cum-Dinnington*. He held that preferment until his death, and his wife also attended the services of the Church. He had two children, the present infants, of whom the boy, *W. F. H. Newbery*, was born on the 7th of May, 1851, and the daughter, *M. A. V. Newbery*, was born on the 2nd of October, 1854.

The testator by his will directed his trustees to stand possessed of the property bequeathed thereby in trust for the benefit of the children living at his death, with such provisions for their maintenance, education, or advancement, either at the discretion of the trustees or trustee for the time being of his will, or of any other person, upon such conditions, with such restrictions, and in such manner as his wife should, during her widowhood, by will or codicil, or writing in the nature of a codicil, from time to time appoint, and in default of appointment equally among his children living at his death; and he appointed his wife, during her widowhood, and the Rev. *H. Caddell*, vicar of *St. Peter's, Colchester*, guardians of his infant children. He died on the 30th of March, 1861.

It appeared from the evidence that Mr. *Caddell* had, with the widow and with the trustees, allowed £300 a-year for the maintenance and education of the infants; but in May, 1864, having learned that Mrs. *Newbery*, the mother, had left the communion of the Church of *England*, and attached herself to the sect of Dissenters known as the *Plymouth Brethren*, refused any longer to sanction the allowance; and this summons was shortly afterwards taken out.

The plan proposed by Mr. *Caddell* was, that the boy should be sent to the school of a Mr. *Murray*, at *Wimbledon Common*, and the girl to a school at *West Heath House, Abbey Wood*, conducted by the widow of the late incumbent of *Christ Church, Worthing*.

Mrs. *Newbery* proposed that her son should be placed under the

care of the Rev. Mr. *Dalby*, present rector of the parish lately held by her late husband; that the daughter, whom she described as a child of a delicate and sensitive constitution, should remain under the care of herself and of a Miss *Acraman*, who had been her governess during the last five years, and was so at the death of the infants' father.

There were several affidavits to shew that the infants' father was very liberally disposed towards dissenters, and used to invite the Wesleyan minister to dinner on Sundays, and often provided refreshments for the Bible Christians' preachers at *Dinnington*, and had friendly intercourse with members of the sect of *Plymouth Brethren*, and in 1851 introduced Mr. *T. Newbery*, a minister among the Brethren, to his wife. He had servants, who were Dissenters, in his service, and when away from home used to attend dissenting chapels. He expressed his disapprobation of parts of the liturgy of the Church of *England*, and in baptizing children was in the habit of leaving out those parts of the service which speak of children being regenerated in baptism. For the last few years he had applied the revenue of his benefice to charitable purposes in connection with the parish.

There was also an affidavit by the male infant "that he had for the last eighteen months been associated and united with those who assemble in the name of the Lord as Christian Brethren, or the *Plymouth Brethren*; that he was not a member of the Church of *England*, and earnestly entreated he might not be compelled to act in reference thereto contrary to his own conscience and conviction.

Mr. *Bacon*, Q.C., and Mr. *C. Hall*, for the summons, contended that the Court would attend to the wishes of the infants' father in settling a scheme for their religious education. There was no conflict here as to the facts. The father had been himself a beneficed clergyman of the Church of *England*, and had selected as one of the guardians a beneficed clergyman of the Church of *England*, who, in the event of the widow marrying again, would be sole guardian. It was clear, therefore, that his intention was that his children should be brought up in that communion to which he himself belonged, and the Court would give effect to that

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intention. When that point was settled, there would be no dispute as to the pecuniary arrangements.

Mr. *Malins*, Q.C., and Mr. *Graham Hastings*, for the mother and the children, said that the real though unavowed purpose here was to separate the infants from the care and influence of their mother.

The evidence shewed that the father was not a strict member of the Church of *England;* but even if he had been, it would not affect the question. Whatever the mother's religious views were, provided they were not dangerous or immoral, the Court would not deprive her of the care of her children: *Lyons* v. *Blenkin* (1); *Witty* v. *Marshall* (2); *Stourton* v. *Stourton* (3). *Talbot* v. *the Earl of Shrewsbury* (4) was also cited.

It was clear from these authorities that the Court recognized no religious distinction, provided it were satisfied that the religious views and habits of the mother were not immoral or dangerous. That the religious doctrines of the *Plymouth Brethren* were not objectionable was well known.

To shew the religious tenets of the *Plymouth Brethren*, the Report on the Census of 1851, *in loco*, was put in.

In this case the boy was too old to have his religious views interfered with: *Stourton* v. *Stourton* (5).

Mr. *R. C. Palmer*, for the trustees of the testator's will.

SIR JOHN STUART, V.C.:—

In cases of this kind, the first thing to which the Court looks is the religious views of the father. Here the father, and the mother also at the death of the father, were members of the Church of *England*. Within the last few years the mother has left the communion of the Church of *England* and has attached herself to a body of Dissenters called *Plymouth Brethren*. There is no evidence to shew that the testator intended his children to be brought up in any other religious principles than those of the church of which he was an ordained minister. This consideration seems enough to conclude the question.

Great stress has been laid on the hardship of separating the

(1) Jac. 245, 253. (2) 1 Y. & C. Ch. 68, 72. (3) 8 D. M. & G. 760.
(4) 4 My. & Cr. 672. (5) ~~1 Y. & C. Ch. 58.~~ 8 Beav. 760

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infants from their mother. There seems to be no reason for a permanent separation. The sole question is, what are the religious principles in which these infants are to be educated, and that must be determined by the religious faith of the father. The elder infant, who is thirteen years old, during the last fifteen months has been taken to attend the Brethren's meeting, and, to my great regret, has been allowed to make an affidavit on the subject of his religious views. Several cases have been cited, and among them the case of *Stourton* v. *Stourton* (1), but they really have no application to this case. I have not the least doubt that I am bound to direct these children to be educated in the doctrines of the Church of *England*, of which their father was a member. In 1836 a similar question arose before Lord *Langdale* in the suit of *Bligh* v. *Bligh* (2), and the order I intend to make here will follow the order of Lord *Langdale* in that case. Declare that the infants be brought up in the communion, doctrines, and worship of the Church of *England* as by law established, that they ought to attend the public worship of such church, and ought not to attend the chapels or meetings of the *Plymouth Brethren*. Let the mother be restrained from taking the infants, or either of them, to such chapels, or to any place of worship where worship is performed otherwise than according to the rites and ceremonies of the Church of *England*. Adjourn it to Chambers to settle a scheme for the education of the infants.

This decision was affirmed by the Lords Justices on the 31st of January, 1866.

Solicitor for the Infants: Mr. *J. T. Vining*.
Solicitor for the other parties: Mr. *St. B. Sladen*.

(1) 8 D. M. & G. 768. (2) 2 Seton, 3rd ed. p. 714.

V.-C. S.
1865
Dec. 5.

PATCH *v.* WARD.

Mortgagor and Mortgagee—Production—Solicitor and Client.

A mortgagee is always bound to produce the mortgage deed for the inspection of the mortgagor.

Semble—Where a solicitor employed professionally by mortgagor and mortgagee subsequently takes a transfer of the mortgage and forecloses; in a suit by a mortgagor to open the foreclosure decree, the solicitor is bound to produce all documents, &c., prepared by him as such solicitor.

THIS was a summons, on the part of the Plaintiff, for the production of certain documents.

There was a considerable conflict of evidence, but it was admitted that between the years 1843 and 1848 the Defendant *Ward* had acted as the Plaintiff's solicitor in obtaining money for him on mortgage. By one mortgage of the 4th of November, 1844, the Plaintiff mortgaged certain property at *Paddington* to *Ward* himself, to secure £3000, and further advances. The mortgage was by other deeds increased to £5500; by a deed of the 3rd of May, 1845, *Ward* transferred to one *Parsons;* and by deeds of the 5th of May, 1845, *Parsons* transferred to *Leaf, Ward, & Bailey.* By an indenture of the 10th of September, 1845, the property was charged with a further sum of £1000, advanced by the Defendant *Vulliamy.* Certain disputes having arisen between the Plaintiff and the Defendant, they resulted in the Defendant instituting the suit of *Ward* v. *Patch,* in which he obtained an injunction restraining the Plaintiff from parting with certain other securities. Certain arrangements were afterwards entered into; and on the 22nd of May, 1847, a foreclosure suit of *Leaf* v. *Patch,* in which *Leaf, Bailey,* and the Defendant *Ward* were co-Plaintiffs, was commenced, *Ward* being also the solicitor. The Plaintiff *Patch* paid to *Ward* £2300, and the mortgage was re-assigned to *Ward.* The Plaintiff, pending the suit, went to *America.* The suit proceeded in his absence, and in March, 1849, a final decree of foreclosure was pronounced. After the order *nisi, Ward* executed a deed of the 1st of December, 1848, transferring his whole interest to *Vulliamy.*

The present bill alleged pressure, and that, in taking the account, proper allowance for rents received had not been made, and also alleged that the transfer to *Vulliamy* was collusive, and that he had no interest in the property.

The answers admitted that *Ward* had acted as solicitor, but denied the collusion, and alleged that the property was now vested in *Vulliamy*.

The prayer of the bill asked for a declaration that the foreclosure decree in *Leaf* v. *Patch* was not binding on the Plaintiff, and that the Plaintiff was entitled to redeem; secondly, for an account of rents due, &c.

The Defendant *Ward*, in his affidavit filed in the cause on the 29th of March, 1865, set out certain documents in his possession, which he classed under five parts in Schedule 1, and all of which he objected to produce. The documents in Schedule 2 had been in his possession, but had been parted with at the times and in the manner specified in the affidavit.

The objections made to the production of the documents mentioned in part 1 of the Schedule were stated thus:—

"The documents in Schedule 1, part 1, consist of instructions for counsel, briefs, and copies of proceedings in *Ward* v. *Patch*, in which I was Plaintiff, and the Plaintiff in this suit, Defendant, in which a final decree of foreclosure was obtained on the 26th of March, 1847, or having reference to the litigation in that suit. All such documents were prepared by me, acting as my own solicitor in *Ward* v. *Patch*, for the purpose of that suit, and the same, I insist, are privileged. I say, further, that the said suit, and all matters in question, were concluded by the decree made on the 26th of March, 1847; and that the proceedings in that suit are not and cannot be impeached. I say that the Plaintiff does not seek relief in respect of the property or matters which were the subject of that suit, and, therefore, that the said documents are not material, and I am not bound to produce them."

The objection to produce the documents in the second part of Schedule 1, which were documents in the suit of *Leaf* v. *Patch*, in which the Defendant *Ward* was a co-Plaintiff with *Leaf* and *Bailey*, and acted as solicitor for himself and the other Plaintiffs, was similar, with the addition that he insisted that these docu-

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ments were further privileged as documents in his possession as solicitor for his co-Plaintiffs.

The objection to produce the documents specified in the third part of the first Schedule, which were of a similar description to those above mentioned, was that they were in his possession as solicitor for *Vulliamy*, a Defendant in *Leaf* v. *Patch*, and were privileged, at all events, in the absence of *Vulliamy*.

The objection to produce the documents in part 4 of Schedule 1 was that they were title-deeds of the premises in question in this suit, and were in his possession as solicitor for *Vulliamy*, in whom the property was vested by the deed of the 1st of December, 1848. This part of the Schedule specified the original mortgage of the 4th of November, 1844, the further charges, the indentures of the 3rd of May, 1845, the 5th of May, 1845, and the 10th of September, 1845.

The objection to produce the documents set forth in part 5 of Schedule 1, which were account books, letter books, and memorandum book, was in effect that they contained entries, &c., relating to various clients; that he, Defendant, had sealed them up, and was not bound to produce them, except the privileged parts were kept concealed, &c.

Mr. *Malins*, Q.C., and Mr. *Fielding Nalder*, now moved for the production of the documents admitted by the Defendant in his affidavit to be in his possession.

The motion was supported on two grounds: first, because of the professional relation subsisting between the Plaintiff and the Defendant. The answer admitted the existence of that relation, and that all the documents in question had been prepared by the Defendant while acting as Plaintiff's solicitor; but if so, documents which abstractedly might be privileged ceased to be so, and must be produced: *Davis* v. *Parry* (1).

Secondly, this bill *bonâ fide* impeached the transactions by which the Defendant became entitled, and, therefore, to hold that these impeached documents could not be inspected, would amount to a denial of justice. The distinction was well settled between

(1) 27 L. J. (N. S.) Ch. 294.

a *bonâ fide* and a mere colourable allegation: *Crisp* v. *Platel* (1); *Balch* v. *Symes* (2).

It was clear that the deeds sought to be produced were not capable of being used as a defence to this suit.

Mr. *Greene*, Q.C., and Mr. *Bevir*, for the Defendant *Ward*:—

The case mainly relied on of *Davis* v. *Parry* (3) had no application, because in that case the deed itself was impeached, whereas here the Plaintiff admitted the validity of the mortgage deed, though he impeached the amount of the debt and the validity of the foreclosure decree. There was no case in which the mere circumstance that the professional relation of solicitor and client had formerly subsisted between the parties, had been held to vary the rule.

But here the parties were at arm's length in 1847, when the Defendant filed a bill against the Plaintiff.

Again, there had been a valid transfer of the mortgage under which the Defendant no longer claimed any interest, his possession of the deeds being that of his client *Vulliamy* and others. The documents therefore were clearly privileged, in the Defendant's hands: *Gill* v. *Eyton* (4). The Defendant in fact was not properly before the Court: *Greenwood* v. *Rothwell* (5). *Wigram* on Discovery (6) was also cited.

At all events, the Defendant was entitled to seal up those entries in the books relating to the affairs of other clients.

SIR JOHN STUART, V.C.:—

There can be no doubt of the wisdom of the rule that a mortgagee or purchaser is not bound to produce his title-deeds, and may resist the production of all deeds which are muniments of title.

But this rule does not extend to the mortgage deed itself, as to which different considerations prevail. It is the mortgage deed which conveys the property by way of pledge, and which contains the proviso for redemption by virtue of which the mortgagor is

(1) 8 Beav. 62.
(2) T. R. 87.
(3) 27 L. J. (N. S.) Ch. 294.
(4) 7 Beav. 155.
(5) 7 Beav. 279.
(6) Page 226.

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entitled to redeem the property. The mortgage deed, therefore, is as much the evidence of the mortgagor's title to redeem as it is of the mortgagee's estate.

It has been contended that, if a mortgagor and mortgagee employ the same solicitor who ultimately becomes transferree of the rights previously acquired by the mortgagee, he is not bound to produce the documents prepared by him as such solicitor. I doubt whether that is a correct view of the law. A solicitor in such a case cannot, as it appears to me, set up a professional privilege as if he had acted confidentially for one only of the parties. Neither can he resist the production of the deeds as if he were in the position merely of a third party. In this suit, in which the mortgagor seeks to get rid of the foreclosure decree, he is entitled to have production of the mortgage deeds, the transfers of the 3rd and 5th of May, 1845, and all the papers in the suit of *Leaf* v. *Patch* (the foreclosure suit), except briefs, opinions, and instructions for counsel, mentioned in the second part of the first Schedule. The deed of 1848 is not to be produced.

Solicitor for the Plaintiff: Mr. *Woodard.*
Solicitor for the Defendant: Mr. *Ward.*

V.-C. S. 1866 *Jan.* 20.

EWING *v.* WAITE.

Sale—Opening Biddings—Final Order.

The usual order to open biddings which provides that, in case there shall be no higher bidding, the person offering the advance is to be allowed purchaser, followed by a certificate of no bidding and of such allowance, is not final, and does not preclude the Court from re-opening the biddings.

ON the 8th of May, 1865, the *Norbiton* estate was offered for sale by public auction, in pursuance of a decree in the suit, and knocked down at £19,000; it was opened at an advance of £500, and knocked down at £28,000; and again opened on an offer of £29,000 by *J. P. Bowring.* The order contained these words:—"And in case there shall be no bidding for the estate at such

re-sale higher than the sum of £29,000, the said *J. P. Bowring* is to be allowed the purchaser thereof at the sum of £29,000."

The estate was offered for sale by auction on the 12th of December, 1865, for £29,000, but no offer was made.

The 5th condition of sale provided that the certificate would be settled on the 16th of December, 1865, and would in due course be signed, and filed, and become binding. On that day the chief clerk certified, "that there being no sale, *J. P. Bowring* is allowed the purchaser."

On the 21st of December, 1865, a summons was taken out to open the biddings on behalf of a Mr. *Martindale*, at an advance of £1000, and now came on before the Court.

Mr. *Fischer*, for Mr. *Martindale*, now asked to have the biddings opened. Before the certificate became final, the Court always endeavoured to get the best price for the property: *Osborne* v. *Foreman*, reported as *Barlow* v. *Osborne* (1); *In re Jones's Settled Estates* (2).

He was stopped by the Court.

Mr. *Dickinson*, and Mr. *Langworthy*, for parties interested in the estate, supported the application.

Mr. *Ince*, for Mr. *Bowring*:—

This is a peculiar case, and not within the rule, which we do not dispute, but it has no application here. The order of the Court was that "in case there shall be no bidding for the estate at such re-sale higher than the sum of £29,000 (which is the event that happened), *J. P. Bowring* is to be allowed the purchaser." In accordance with that order the chief clerk certified, "that there being no sale, *Bowring* is allowed the purchaser." It is submitted, therefore, that this case is taken out of the ordinary rule; the order and certificate being under the circumstances final.

SIR JOHN STUART, V.C.:—

In *Osborne* v. *Foreman*, I had some doubts whether I was not going too far, but the House of Lords adopted the view I took and settled the practice.

(1) 6 H. L. C. 556. (2) 1 Giff. 284.

V.-C. S. 1866 EWING v. WAITE.

The order in this case is in the common form, and there is no ground for the argument that it is final. There must be the usual order to open the biddings.

Solicitors for the Plaintiff: Messrs. *Ford & Lloyd.*

Solicitors for the Defendants: *J. Chapple;* Messrs. *Russell & Davies.*

Solicitor for *Martindale:* Mr. *T. W. Rogers.*

V.-C. S. 1865 *Nov.* 13, 14.

DOWLING *v.* DOWLING.

Will—Life Interest—Gift by Implication.

The testator having five sons, gave an annuity to one (*Henry*, a lunatic), and at his (testator's) death a legacy "to each of my sons," naming only the other four, and directed his executors to invest his residuary personal estate in stock; "the interest therefrom to be divided half-yearly between my four sons above-named, and at the decease of either without lawful issue such share to revert to the remainder then living, their child or children:"—

Held, first, that the four sons only (excluding *Henry*) were entitled; and, secondly, that they took only for life, with an estate, by implication, to their issue living at their death, as joint tenants.

Ex-parte Rogers (1) considered.

R. H. DOWLING, by his will dated the 18th of November, 1859, having appointed executors, made the following disposition:—

After giving certain legacies, the testator proceeded as follows: "To my daughter, Mrs. *Russell*, I give £100, and the interest of £2000 for her natural life, the capital to be at her own disposal at her death. To her husband, *Robert Russell*, I give £1000; to my son-in-law, *John Barton Shaw*, £100, and the interest of £3000 during his natural life; at his death the capital sum to be divided between his children equally, but excluding his eldest son, *J. R. Shaw*, who shall not inherit any portion of my property. To my son-in-law, *Thomas Henry Plasket*, I give the sum of £100, and the interest on the sum of £3000 for and during his natural

(1) Registrars' Book, A. 1815, page 849. The case is entered under the name of *Blackshaw* v. *Rogers*, and is dated Wednesday, April 3, 1816. It appears from the order that the decree was made on the 12th of July, 1779, in both cases of *Blackshaw* v. *Rogers* and *Snelson* v. *Rogers*.

life, after which the principal sum to be equally divided between his children, being my grandchildren. I also bequeath to my unfortunate son, *Henry*, £70 per annum for his maintenance during his natural life; to my son *Richard Hoare*, the freehold land in *Effingham Place, Deptford;* and at my decease £100 to each of my sons, as follows:—*Richard Hoare, Edward Plasket, Charles Hoare*, and *Stanley Hoare*, as also the remainder of my household furniture and all things appertaining to my household effects, to be equally divided. That my freehold estates and all other property shall be disposed of as my executors may think best, and be added to and invested with my other personal property, either in railway debentures or any other stock they may deem best, *the interest therefrom to be divided half-yearly between my four sons above-named*, and at the decease of either without lawful issue such share (1) revert to the remainder then living, their child or children."

The testator died on the 1st of May, 1860, without having revoked his will, which was proved by *E. P. Dowling* alone, the other executors named having renounced.

The testator left his widow *Albinia*, his five sons, his daughter Mrs. *Russell*, and his granddaughter, him surviving. The state of the testator's family, so far as it related to the question before the Court, was as follows:—The Defendant *R. H. Dowling* was his heir-at-law, and he and his four other sons, his daughter Mrs. *Russell*, and the four children of one deceased daughter (*Matilda*), and the three surviving children of another deceased daughter (*Emma*), were his next of kin at his death.

The executor who proved, under a power contained in the will, appointed two other trustees jointly with himself, sold nearly the whole of the real estate, got in the personalty, and made appropriations for the different legacies.

Henry, the son described in the will as an unfortunate, was a person of unsound mind, and one question before the Court was whether he took any interest under the words "to each of my sons."

E. P. Dowling had several children. He executed several incumbrances on his share, and subsequently became bankrupt.

(1) Sic in orig.

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Mr. *Malins*, Q.C., and Mr. *Cracknall*, for the Plaintiff, who was one of the sons who had not incumbered his share:—

Upon the true construction of the will the four sons, exclusive of *Henry*, were entitled to the bequest absolutely, defeasible only in the event of their dying without issue, in which case there was a gift over "among the survivors, their child or children." Under the *Wills Act*, dying without issue meant dying without issue living at the death, unless the contrary intention appeared on the will. The intention must be determined at the death.

Where a gift after a previous life-interest is to *A* or his issue, it means a gift to him absolutely, subject to be divested if he die leaving issue in the lifetime of the tenant for life: *Salisbury* v. *Petty* (1).

There was no gift here to the children of the sons at all, and the form of the gift excluded any such intention, because the gift was to *A*, and if he died without issue, then over. Consequently, if *A* had children the gift over failed, and *A* took absolutely. The case of *Forth* v. *Chapman* (2) decided that, on a gift of personal estate to *A*, and if he shall die without issue, then over, the gift over was void, and *A* took absolutely, though, if it were real estate, the language was sufficient to create an estate tail.

That words such as those in this will would not create an estate in personalty by implication in the children was settled: *Addison* v. *Busk*, *Lee* v. *Busk* (3). The same doctrine was laid down in that case on appeal, *Addison* v. *Busk* (4), where *Ex parte Rogers* (5) was observed on. The result of all the authorities was, that where there is a gift to *A* and his children, *A* takes absolutely, and the children take nothing: *Clarke* v. *Gould* (6); *Rose* v. *Bartlett*, cited in *Wilson* v. *Eden* (7); *Sparks* v. *Restal* (8).

Mr. *Osborne*, Q.C., and Mr. *Speed*, for the assignees in bankruptcy of *E. Plasket Dowling*:—

It is well settled that an indefinite bequest of dividends or interest will pass the capital: *Philipps* v. *Chamberlaine* (9); *Elton*

(1) 3 Hare, 86.
(2) 1 P. Wm. 663.
(3) 14 Beav. 459.
(4) 2 D. M. & G. 810.
(5) 2 Madd. 449.
(6) 7 Sim. 197.
(7) 11 Beav. 237.
(8) 24 Beav. 218.
(9) 4 Ves. 51.

v. *Sheppard* (1); *Humphrey* v. *Humphrey* (2); *Weale* v. *Ollive* (3); *Haig* v. *Swiney* (4); *Page* v. *Leapingwell* (5).

In *Addison* v. *Busk* there was a bequest of the residue of personal estate to trustees, on trust for *A*; but if he died intestate in the lifetime of the testator without leaving any child or children him surviving, then in trust absolutely for *B*. On his death in the lifetime of the testator it was held there was no gift by implication to his children. In *Cooper* v. *Pitcher* (6) there was a legacy to *A*, and in case he shall die in the testator's lifetime without issue, then over. *A* died, living the testator, leaving a child, and it was held that *A's* child was not entitled.

In *Greene* v. *Ward* (7) the same doctrine was laid down; in fact, there is no case but *Ex parte Rogers* (8) on which the present contention could be supported, and that case has been deliberately overruled in *Addison* v. *Busk* (9). *Ranelagh* v. *Ranelagh* (10) was also referred to.

Mr. *W. W. Cooper*, for an incumbrancer of *E. P. Dowling*, also contended that there was an absolute gift to each of the sons, defeasible only in the event of their dying without issue.

There was no authority for contending that any gift arose by implication on these words in favour of the issue, except *Ex parte Rogers* (8). In *Addison* v. *Busk* (9), Lord *Cranworth* distinctly overruled that case; and in *Neighbour* v. *Thurlow* (11), the Master of the Rolls refused to follow it, and stated in *Webster* v. *Parr* (12) that, in a case in which he had been engaged, Lord *Cottenham* had refused to follow *Ex parte Rogers* (8). Even in *Wetherell* v. *Wetherell* (13) the decision rested on the word "only."

Mr. *Greene*, Q.C., for another son, took the same view, and submitted that, whenever the testator intended to dispose of capital, he said so. The word share clearly referred to income. The result of this construction would be that there was an intestacy.

(1) 1 Bro. C. C. 531—3.
(2) 1 Sim. N. S. 536.
(3) 32 Beav. 421.
(4) 1 S. & S. 487.
(5) 18 Ves. 463.
(6) 4 Ha. 485.
(7) 1 Russ. 262.
(8) 2 Madd. 449.
(9) 2 D. M. & G. 810.
(10) 12 Beav. 200; 2 M. & K. 441.
(11) 28 Beav. 33.
(12) 26 Beav. 236.
(13) 4 Giff. 51.

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Mr. *Waller* also, for a mortgagee of *E. P. Dowling's* share, submitted that there was an intestacy.

Mr. *Bacon*, Q.C., and Mr. *Peachy*, for two of the daughters, and Mr. *Schomberg* for the widow, also contended for an intestacy.

Mr. *Aiken*, for the children of *E. P. Dowling*:—

The word here is half-yearly, which is more significative of a life interest than the word annual.

In *Wetherell* v. *Wetherell* (1), the controlling word was "only," and the words "share" and "interest" also occurred in that case.

It has never been laid down in any of the cases that there can not be a gift by implication to the children. Here the children of the four sons were the object of the testator's bounty, and that fact distinguished this case from those authorities supposed to be at variance with the principle now contended for.

Assuming, for argument sake, that the objection to *Ex parte Rogers* (2) is well founded, it is to be observed that, in that case, the gift was to strangers. In *Ranelagh* v. *Ranelagh* (3) the children were never mentioned at all as objects of the testator's bounty. It was admitted, in that case, that there might be a gift by implication, though the language there did not go so far. *Lee* v. *Busk* (4) has no application to this case, because the persons to whom the life interest was given survived the testator. In *Greene* v. *Ward* (5) there was sufficient on the face of the will to raise a presumption against the implied gift to issue. On the whole it is submitted that children took by implication.

Mr. *Malins*, in reply:—

The only case in support of the construction, that the children take by implication, is *Ex parte Rogers* (2), which has been repeatedly overruled.

The case of *Wetherell* v. *Wetherell* (1) has no application, because the intention was to benefit godchildren or grandchildren only.

SIR JOHN STUART, V. C.:—

It is with great difficulty I have been able to come to the

(1) 4 Giff. 51.
(2) 2 Madd. 449.
(3) 2 Beav. 200; 2 M. & K. 441.
(4) 14 Beav. 459; S. C. 2 D. M. & G. 810.
(5) 1 Russ. 262.

conclusion that the sons take at all, but I have satisfied myself that the four sons are entitled to take, and that the testator deliberately, and on an intention clearly expressed, excluded from the gift now in question the lunatic son.

The argument now is that these four sons take absolute interests, only cut down in a particular event; of the two questions raised in this suit this appears to me the less difficult, because the gift to the sons is clearly of the yearly income. There are no words which amount to an unlimited gift of yearly income, and in the line subsequent to the direction, to divide half of the income of the property, the word share is used, which I cannot construe, as share of income. The word share must have its proper meaning, and be considered to refer to the share of the capital. The context sufficiently shews that to be the meaning.

The next question is one so perplexed by authority, that it is singularly difficult to deal with it. It has been treated, I think erroneously, as one concluded by a series of authorities to which there is opposed only a single case.

In *Neighbour* v. *Thurlow* (1) the Master of the Rolls is reported to have said that, "it is settled that where there is a gift to *A* for life, and in case *A* dies without leaving issue, then to *B*, it does not create an implied gift to children of *A*." There are ample authorities for that proposition. But that deals only with the simple case where the context raises no difficulty. Opposed to that case and those authorities is the case of *Ex parte Rogers* (2).

Lord *Langdale* did not overrule *Ex parte Rogers* (2), nor did he express any opinion further than this, that in *Ranelagh* v. *Ranelagh* (3) he came to a conclusion in a great measure irreconcilable with it, but in doing this, he said (4), he could not answer the question put by Sir *Thomas Plumer* in that case.

Now Sir *Thomas Plumer* did not decide the case of *Ex parte Rogers* (2) on his own authority, but on the authority of Lord *Thurlow*—a circumstance which appears to have escaped the attention of the learned Judges who have criticised that case. I have not adverted to the reasoning of Sir *Thomas Plumer*, which certainly is intelligible, viz., that if the testator mentions the issue,

(1) 28 Beav. 33.
(2) 2 Madd. 449.
(3) 12 Beav. 200.
(4) *Ibid.* 205.

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or if there is a gift to *A*, and if he dies without issue, then to *B*, that the reference to the issue shews he must intend to give them something or nothing. Sir *Thomas Plumer* decided, *Ex parte Rogers* (1), on the authority of *Harman* v. *Dickenson* (2), a decision which is referred to in all the text books, either by judges or text-writers, and the soundness of which has never been questioned.

In that case there was a bequest to two daughters of the testator, and if one died without issue, then to the surviving daughter and her issue. One of the daughters died married and leaving issue. Then the unmarried daughter died; and the Lord Chancellor held that the bequest went to the issue of the married daughter, although she did not survive.

The difficulty is, that there is a strong current of authorities against the decision of Sir *Thomas Plumer*. The Court of Appeal did not advert to the circumstance that *Ex parte Rogers* (1) is really founded on the decision of Lord *Thurlow*. Fortunately, in this case the context appears to me to relieve the difficulty. In one particular event, and in one state of circumstances, the children or the issue of the brothers were clearly and distinctly and are admitted to be objects of the testator's bounty. In *Ex parte Rogers* (1) the learned Judge asked, why did the testator mention the children if he did not intend them to take anything? So here, why did the testator mention issue? He must have intended them to take something or nothing, because when he was disposing of his property among the others, he must have had their issue in his mind for this purpose. Lord *Langdale*, in *Ranelagh* v. *Ranelagh* (3), said he could not say that the testator intended the children to take nothing, and would not answer the question; but Sir *Thomas Plumer* answered by the decision, and in the present case the answer is assisted extremely by the circumstance that the issue of these sons are in one event clearly objects of the bounty.

That circumstance so far assists the implication which to my mind arises, notwithstanding the current of authorities, that I cannot come to any other conclusion than that the issue of these four sons took by implication, and that the gift over does not operate in derogation of the right of the issue, and the result is that the sons did not take absolute interests in the capital.

(1) 2 Madd. 449. (2) 1 Bro. C. C. 91. (3) 12 Beav. 200.

I must hold therefore that the sons take only an estate for life, with an estate by implication to their issue living at their death as joint tenants. V.-C. S. 1865 DOWLING v. DOWLING.

Solicitor for the Plaintiff: Mr. *O. Richards.*

Solicitors for the other parties: Messrs. *Taylor, Hoare & Co.*; Mr. *Bodman.*

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V.-C. S. 1866 *Jan.* 17, 18.

Copyholds—Surrender—Admittance—Enfranchisement—Specific performance.

It is no sufficient objection to the title of the vendor of an enfranchised copyhold that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord.

Semble, the non-admittance of a surrenderee leaves in the surrenderor an interest which exists only for the benefit of the lord, and does not leave any beneficial interest in the surrenderor or his heir.

BILL for specific performance. *Susan Biggs*, by an indenture dated the 1st of June, 1848, conveyed freehold portions of certain hereditaments to the use of *N. L. Pateshall* and his heirs, and the same indenture contained a covenant for the surrender of the copyhold portions "to the use of *N. L. Pateshall*, his suis or heirs," according to the custom of the manor of *Hinton*, the whole by way of mortgage for securing the payment of £700 and interest.

By an indenture of settlement, dated the 7th of June, 1848, made in contemplation of marriage, *Susan Biggs* conveyed the freehold portions of the same hereditaments unto *T. Worthing* and his heirs, subject to the mortgage, to the use of herself until marriage, and after the solemnization thereof to the use of herself and her assigns for life, with remainder to the use of the Plaintiff and his assigns for life, with remainder "To such uses upon and for such trusts, ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, and charged and chargeable in such manner and for such estate and estates, interest and interests, as *Susan Biggs* (afterwards *Minton*)

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should from time to time by any deed or instrument, or by her last will and testament in writing, notwithstanding her then intended or any future coverture, direct, limit, or appoint," and in default of appointment to the use of all and every the children, if more than one, of *Susan Biggs*, their heirs and assigns, in equal shares and proportions as tenants in common; but if there should be only one such child, then to the use of such only child, his or her heirs and assigns; but if there should be no such child, then to the use of the heirs and assigns of *Susan Biggs* for ever; and *Susan Biggs* covenanted with *T. Worthing* that she would, at the then next Court to be held for the manor, surrender the copyhold portions of the same hereditaments to the end that the lord might re-grant the same to *T. Worthing* and his heirs, "To hold the same unto the said *T. Worthing*, his heirs and assigns, subject to the mortgage, to such and the same uses as were thereinbefore expressed and declared concerning the freehold portions of the hereditaments, or as near thereto as the nature and tenure of the property would admit of."

On the 14th of June, 1848, at a general Court Baron held for the manor, *Susan Minton* was duly admitted tenant of the copyholds, "to hold to her and her suis or heirs, according to the custom," and at the same Court she duly surrendered the copyholds "to the use of *N. L. Pateshall*, and his suis or heirs," subject to redemption by *Robert Minton* (the Plaintiff) and *Susan* his wife, and their suis or heirs, executors, &c., upon payment of £700 and interest.

No admittance ever took place under that surrender. *Susan Minton* (who died on the 26th of April, 1852) by her will dated the 22nd of December, 1851, appointed the freeholds and copyholds to the use of her husband, *Robert Minton*, and his heirs; and on the 25th of November, 1853, he was admitted tenant of the copyholds.

In March, 1864, the Defendant entered into a treaty for purchase, and in his answer he stated that he wrote to the Plaintiff's agent, simply telling him that he had decided upon purchasing the property in question (the whole thereof to be made freehold, and everything to be correct with regard to title) at the price of £1450. The same firm of solicitors at first acted in the matter

for both vendor and purchaser, and on the 6th of May, 1864, the Defendant received a letter from the solicitors, accompanied by an agreement with certain conditions, for his signature in reference to the purchase of the property, in which letter it was stated that the agreement only contained stipulations usual in such cases. The agreement so prepared, however, contained conditions providing for the commencement of the title from 1815; that, if there were any requisitions on the title which the vendor should be unable or unwilling to comply with, the vendor should be at liberty to annul the contract, and the purchaser should bear his own costs; and that recitals in deeds or other instruments twenty years old should be sufficient evidence of the facts recited. On the 14th of May, 1864, the Defendant, relying on the letter of the solicitors, signed the contract.

By an indenture dated the 26th of November, 1864, made between the lord of the manor and the Plaintiff, the former enfranchised the copyholds, and granted them to the Plaintiff, and his heirs, discharged from the copyhold tenures to the use of the Plaintiff and his heirs, subject and without prejudice to the conditional surrender of the 14th of June, 1848. The mortgage debt of £700 was still due, and the same and the securities were vested in *Evan Pateshall* and *F. L. Bodenham*, and they were willing to concur in the conveyance to the Defendant.

On the title being submitted to counsel on behalf of the Defendant, objections were taken to it as regarded the copyholds; first, that it was not clear that the Plaintiff was the equitable owner of the part of the property formerly copyhold, because the covenant in the indenture of settlement of 1848 to surrender the copyholds to such and the same uses as were thereinbefore expressed and declared concerning the freeholds, or as near thereto as the nature and tenure of the property would admit of, did not give *Susan Minton* the power of appointment over that part of the property, because the limitation of the freeholds to such uses, &c., as *Susan Minton* should appoint was not a use expressed and declared thereof; secondly, that even if the Plaintiff was equitably entitled, he could not make a good legal conveyance without the concurrence of the customary heir of his wife. No admittance having taken place upon the conditional surrender to *N. L. Pateshall*, and no

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surrender or admittance having been made under the covenant to surrender in the settlement, it was insisted that the legal estate in the copyholds descended, upon the death of Mrs. *Minton*, to her customary heir, and that as in consequence of the deed of enfranchisement no admittance could now take place, it was incumbent upon the vendor to procure from the heir of his wife a conveyance of his estate by feoffment, which would either convey it or operate as a conveyance by making a forfeiture. The Defendant also objected to the conditions on the ground that they contained stipulations which were unfavourable to him, and favourable to the Plaintiff, and which were not usual stipulations to insert in an agreement such as the one of March, 1864, except by express contract.

Mr. *Bacon*, Q.C., and Mr. *Blackmore*, for the Plaintiff:—

The objections to complete the purchase are frivolous, for there is no doubt that under the provisions of the settlement, and the wife's will, the Plaintiff can make a valid title to that part of the property which is copyhold. The copyholds are within the power, and that power was exercised in favour of the Plaintiff. The second objection is reduced to a question of conveyance, and is not one of title. The concurrence of the customary heir is not necessary to the conveyance.

Mr. *Malins*, Q.C., Mr. *Smythies* (C. L. Bar), and Mr. *Bristowe*, for the Defendant:—

First, as to the conditions. The solicitors acted for both parties, and the Defendant ought not to have been asked to sign them, and he is not bound by them. In a sale by auction such conditions are usual, and being known, no purchaser could object to them; but there is no precedent for such conditions after a sale by private contract, and where the price had been agreed upon. These conditions having been accepted on a representation that they were not unusual, ought to be rejected: *Tanner* v. *Smith* (1); *Sug.* V. & P. (2); *Hoy* v. *Smythies* (3); *Falkner* v. *The Equitable Reversionary Society* (4).

(1) 10 Sim. 410; s. c. on app. 4 Jur. 310.
(2) 14 ed. 352, pl. 29, note 1.
(3) 22 Beav. 510—520.
(4) 4 Drew. 352.

Next as to the title. A purchaser is entitled to have it free from equitable and legal objection; and also to a conveyance of both equitable and legal estates. If there be a doubt about his obtaining both, the Court will not enforce specific performance of the contract. The question is, whether the purchaser is to take a title which will in all probablity involve him in litigation with the customary heir; and if he raise a reasonable presumption that that will happen, the vendor must obtain the concurrence of the heir to the conveyance, or the contract ought not to be performed. The legal estate in the copyholds remained in the surrenderor, and descended to the heir, and the enfranchisement did not alter his rights. He could pay off the mortgage and claim admittance. The mortgagee not having been admitted, had no estate; while the heir could bring ejectment, though not admitted. A surrender is only a permission or licence to the lord to admit a certain person, and till acted upon no estate passes, and it is no more than a power of attorney to execute a conveyance. If the heir will not concur in a conveyance, the objection which is relied upon, that the appointment by Mrs. *Minton* could not in any sense operate upon the copyholds, is fatal to the title. The admittance of the Plaintiff by the steward was clearly an error, for, as regards the copyholds, the trustee of the settlement never acted in the trusts; and after the enfranchisement, neither the mortgagee nor the trustee could be admitted. If the property had remained copyhold, it would have been absolutely necessary to have had an admittance and a surrender from the mortgagee. A vesting order cannot be made where there is opposition by the heir. The following cases and authorities were referred to: *Sug.* V. & P. (1); *Steele* v. *Waller* (2); *Doe* v. *Wroot* (3); *Doe* v. *Tofield* (4); *Scriven* on Copyholds (5); *Rex* v. *Wilson* (6); *Pyrke* v. *Waddingham* (7); *Doe* v. *Bellamy* (8); *Collier* v. *McBean* (9); *Bell* v. *Langley* (10); *Murrel* v. *Smith* (11); *Phillips* v. *Ball* (12); *Wilson* v. *Allen* (13);

(1) 14 ed. p. 395. pl. 27.
(2) 28 Beav. 466.
(3) 5 East, 132.
(4) 11 East, 246.
(5) 1. 4 ed. 467—528.
(6) 10 B. & C. 80.
(7) 10 Ha. 1.
(8) 2 M. & S. 87.
(9) Law Rep. 1 Ch. 81.
(10) 4 Leon. 230.
(11) 2 Coke, 334.
(12) 29 L. J. (N.S.) (C. P.) 7.
(13) 1 Jac. & W. 611—620.

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Doe v. *Bartle* (1); *Flack* v. *Downing College* (2); *Powdrell* v. *Jones* (3); *Buckmaster* v. *Harrop* (4); *Costigan* v. *Hastler* (5); and *Hoddel* v. *Pugh* (6).

SIR JOHN STUART, V.C.:—

The jurisdiction is discretionary, and unless the vendor can shew a good and valid title, the Court will not force it upon the purchaser. The purchaser asserts that the special agreement which he signed in May, 1864, does not bind him, because he signed it upon the representation of his own solicitors that it contained the usual clauses; that he was deceived by that representation, and that the purchase ought not to be forced upon him. If the purchaser is right upon that point, he is bound only by his original contract, which is without any stipulations as to terms. The special agreement was signed deliberately by the purchaser, with the view of binding himself, and of letting the Plaintiff know that he bound himself, to purchase upon the terms which are specified. The representation that the terms were usual is admitted to have been honestly made—made with no fraudulent view; still it is said it was a mistake. The solicitors acted for both parties, and strong observations have been made upon the impropriety of one firm of solicitors acting for both parties in a case where those parties have conflicting interests; and though there is great force in those observations, yet it would be too much to say that the same firm of solicitors may not, in some cases, properly attend to the interests of both clients. As the Defendant, with the assistance of professional advice, deliberately signed the agreement, I must hold him bound by the stipulations which it contains.

The objection to the title is of an extraordinary and unusual kind, and occurs entirely in consequence of an anomaly in the law of copyholds. The copyholds in question belonged to a married woman. Her settlement contained a covenant to surrender to a trustee to uses, similar to those expressed and declared concerning certain freeholds; but it is not material to consider the effect of that limitation, because after the execution of the settlement the

(1) 5 B. & A. 492.
(2) 13 C. B. 945.
(3) 2 Sm. & Giff. 407.
(4) 13 Ves. 456.
(5) 2 Sch. & Lef. 160.
(6) 33 Beav. 489.

wife, upon a separate examination, surrendered the whole fee simple into the hands of the lord to the intent that the mortgagee might be admitted. That surrender reserved to the husband and wife, and their suis or heirs, the right of redemption. It is not disputed that it was a surrender of the whole legal interest; and all that was necessary to be done to perfect the title of the mortgagee was that he should be admitted. The husband survived his wife, and acquired the whole equity of redemption, and, he having performed the conditions upon which the surrender was made, was entitled to hold the property.

By the enfranchisement the lord was denuded and deprived of all his rights in the property, and of all power to admit, and his rights became vested in the husband, who was entitled to the equity of redemption. By the enfranchisement the Plaintiff has been placed in the situation of the lord. If that deed had not been executed, the mortgagee could have perfected his title by admittance, but that cannot now be done.

The law of copyholds is, that until a surrenderee has been admitted, his title is incomplete, and that the lord is entitled to treat the surrenderor as his tenant. This has been called a legal estate in the surrenderor; but that is a mistake, for it is a sort of interest which results, not with a view to the benefit of the surrenderor, but of the lord. The objection is, that as the mortgagee was not admitted, the customary heir of the wife, who surrendered everything, can interrupt the title of the Plaintiff and the mortgagee, by bringing an action at law primarily against the latter. But I think he cannot interrupt the title, and that if an action were brought, it would be decided at law, as in equity, that the heir—an admittance being no longer possible—has no interest.

My opinion, therefore, is that it would be dangerous to hold upon this objection that the heir has an interest, for I should thereby stamp upon this property the character of being unmarketable.

As to the objection that the purchaser ought not to be exposed to the risk of litigation by the customary heir, it appears in the case of *Osbaldeston* v. *Askew* (1) where a bill was filed by a vendor for specific performance, and there was a reference as to the title,

(1) 1 Russ. 160.

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that subsequently to the contract a suit had been instituted in which some portion of the land—nine acres—was claimed adversely to the vendor, and Lord *Eldon* was of opinion that that was not a sufficient ground for reporting that a good title could not be made, and that there was no reason why specific performance should not be decreed. Therefore there will be a decree for specific performance of the contract contained in the agreement of May, 1864; and a declaration that, having regard to the enfranchisement, the concurrence of the customary heir of Mrs. *Minton* is not necessary.

Solicitor for the Plaintiff: Mr. *Westall,* agent for Messrs. *Bodenham & James, Hereford.*

Solicitors for the Defendant: Messrs. *Tate & Jourdain,* agents for Mr. *Sandford, Shrewsbury.*

KERMODE *v.* MACDONALD.

M. R.
1856
Feb. 14, 15, 19.

Will—Codicil—Legacy—Specific Legacy—Charge on Real Estate—Revocation.

A testatrix, by her will, gave to *A.* for life the interest of £300, or thereabouts, invested by her in the *General Steam Navigation Company*, and the interest of £200; and after *A.*'s death she gave the "said principal sum of £500" to *A.*'s children; and she directed that, in case of her personal estate proving insufficient for the payment of her legacies, such deficiency should be made up out of her real estate, by sale or mortgage. By a codicil she gave "all her personal estate" to *B.*:—

Held, that the whole personal estate passed by the codicil; that the legacy of £300 was specific, and was revoked by the codicil; and that the legacy of £200 was not revoked, but remained charged on the real estate.

Louisa Thomas, by her will, dated the 28th of July, 1832, specifically devised certain real estates in *Wales*, and bequeathed (among other legacies) to *Mary Anne Judith Griffith* the interest, profits, or produce of the sum of £300 British, or thereabouts, invested by the testatrix in the *General Steam Navigation Company, London*, and also the interest of £200 British, for her life; and, upon her decease, the testatrix desired that "the said principal sum of £500" should be equally divided amongst the children of *Mary Anne Judith Griffith*, and she directed that, in case of her personal estate proving insufficient for the payment of the legacies thereinbefore mentioned, then such deficiency should be made up from and out of her real estates in *Wales*, by sale or mortgage, as might be deemed most advantageous to the interests of the parties who might then be entitled to such estates; and she appointed *Sage Ann Gelling* and *Eleanor Griffith* executrixes, and bequeathed the residue of her personal estate to *Sage Ann Gelling* and *Ann Thomas*.

On the 11th of September, 1858, the testatrix made a codicil in these words:—"This is a codicil to my last will and testament, bearing date the —— day of ——, 18—; and I direct it may be taken as part thereof. I give, devise, and bequeath unto *Annie Cosnahan Macdonald* all my personal estate; and I hereby appoint *Annie Cosnahan Macdonald* sole executrix of this codicil to my will."

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The testatrix died in March, 1859, and in November, 1859, administration, with the will and codicil annexed, was granted to *Alexander Macdonald, Annie Cosnahan Macdonald* having renounced probate.

Mary Anne Judith Griffith married *William Kermode*, and died in the lifetime of the testatrix, leaving *William John Kermode*, her only child.

The bill was filed by *William John Kermode* against *Alexander Macdonald* and the devisees of the estates in *Wales*, to have the Plaintiff's legacy paid out of the testatrix's personal estate, and, if necessary, to have it raised by sale or mortgage of her real estate in *Wales*.

The Defendants, by their answers, insisted that the Plaintiff's legacy, and all the other legacies given by the will, were in effect and by necessary implication revoked by the codicil; and that, by reason and in consequence of such revocation, the charge of the legacies on the real estate in aid of the personal estate had become inoperative, and failed of effect.

Mr. *Baggallay*, Q.C., and Mr. *Atkin*, for the Plaintiff:—

The gift in the codicil must be construed as a gift of the residuary personal estate, after payment of the legacies, in substitution for the residuary bequest contained in the will. The will and codicil must be read together; and a clear gift in the will is not impliedly revoked unless by an equally clear inconsistent disposition by the codicil. In *Robertson* v. *Powell* (1), a devise of a life estate by a will was held not to be revoked by a devise of "all the testator's estate and property" by a codicil. In *Cleoburey* v. *Beckett* (2), a clear devise was not revoked by an expression in the codicil that the devisees were "not intended to take any beneficial interest under the will."

But, assuming that the whole of the personal estate passed by the codicil, the legacies are not revoked by the alienation of one of the funds out of which they were to come, but are raisable out of the real estate, the personal estate being thus made insufficient to pay them: *Buckeridge* v. *Ingram* (3).

Mr. *Shebbeare*, for the Defendant *Alexander Macdonald*, and one

(1) 3 N. R. 433. (2) 14 Beav. 583. (3) 2 Ves. 652.

of the devisees of the real estate in *Wales*, and Mr. *Jessel*, Q.C., and Mr. *Bevir*, for the other devisees of the same estate :—

The codicil in the clearest terms disposes of the whole personal estate. In *Robertson* v. *Powell* (1), the terms of the codicil shewed that legacies given by the will were not revoked, and that, consequently, the general terms of the devise and bequest must be modified; and, therefore, the Court considered itself justified in cutting down the *quantum* of interest apparently given by the codicil by holding it to be subject to the life estate given by the will. But in this codicil there is nothing to qualify the generality of the gift. That being so, the legacies, which are part of the personal estate, are revoked by the inconsistent disposition, and, the legacies being revoked, the charge on the real estate fails: *Brudenell* v. *Boughton* (2); *Sheddon* v. *Goodrich* (3).

The insufficiency of the personal estate, upon which the legacies are by the will directed to be raised out of the real estate, does not refer to an inconsistent testamentary disposition of the personal estate. In *Buckeridge* v. *Ingram* (4), the legacies were charged on real and personal estate together; and the codicil, being unattested, could not revoke the legacies, so far as they were charged on the real estate. Here, the charge on the real estate is merely auxiliary. The Plaintiff's legacy of £300, invested in the *General Steam Navigation Company*, is a specific legacy, and it, at all events, is revoked by the gift of all the personal estate.

Mr. *Atkin*, in reply :—

The legacy of £300 is a demonstrative legacy: *Le Grice* v. *Finch* (5), and is charged on the real estate, the testatrix having put it on the same footing as the £200, by speaking of "the said principal sum of £500."

Feb. 19. LORD ROMILLY, M.R. :—

In this case I am of opinion that the effect of the codicil is to pass the whole of the testatrix's personal estate. When she says

(1) 3 N. R. 433. (2) 2 Atk. 268. (3) 8 Ves. 500.
(4) 2 Ves. 652. (5) 3 Mer. 50.

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"all my personal estate," I am of opinion that I cannot say that that means less than all her personal estate whatsoever and wheresoever. Having come to that conclusion, I look back to the will to see what the effect of that codicil is upon the will. Now, in the first place I think the gift of £300 British invested by the testatrix in the *General Steam Navigation Company* is a specific gift. I think that means the £300, that is, the shares, which she had in the *Steam Navigation Company.* It is not a legacy of £300 to be paid out of a particular fund, which would make it a demonstrative legacy, but it is £300 which has been invested in that company, and therefore I am of opinion that that was a specific legacy of those shares. But I am of opinion that by the codicil that legacy is disposed of; the gift of all the personal estate carries it away, and, consequently, it is adeemed or revoked by the inconsistency of the disposition.

But with respect to the other, the £200, which is a general legacy, a question of much greater difficulty arises. I have already stated that, in my opinion, the codicil gives the whole of the personal estate; but then there is a direction in the will, that in case of the personal estate proving insufficient for the payment of the legacies, such deficiency is to be made up out of the real estate in *Wales* by sale or mortgage. The rule in cases of this description is this: that in giving effect to the codicil you are to disturb the original will as little as possible, and it is to be observed that the codicil here not only republishes the will, but expressly refers to it (although it does not give the date) as being her last will and testament.

Now, I find it extremely difficult to say, that the legatee takes no interest at all. It was contended, in argument, that the fund out of which it was to be paid being taken away, the legacy itself failed. I adopt that view, where it is a specific legacy, because unquestionably if a testatrix gives £300 invested in *Steam Navigation Company* shares to *A*, and afterwards by codicil gives those shares to another person, by using words which include them, then the legacy is revoked, and, there being no legacy, the fact of saying that the legacies shall be charged on the real estate would not create a legacy which no longer exists. That would apply to all cases of specific gift; but I am not of

opinion that it is so with respect to a pecuniary legacy. Here is a legacy of £200, and the testatrix says that it shall be paid, in case her personal estate is insufficient, out of her real estate. What do the devisees of the real estate take? They take the real estate subject to such a charge as may be necessary for the payment of this legacy, the personal estate being insufficient. Suppose the personal estate had become insufficient by an act of the testatrix herself in her lifetime, would that have made any difference? Or suppose that the whole of her personal estate had consisted of certain specific chattels, and that she had disposed of all those by her codicil, would that have destroyed this legacy? I am of opinion it would not, nor does the fact of her disposing of the whole of the personal estate do more. It makes it quite clear that the personal estate is insufficient to pay the legacy, and then I think that the charge upon the real estate remains. Suppose the testatrix had said, "I give £200 to be paid out of my 3 per cent. Consols, and in case the 3 per cent. Consols shall be deficient, I direct it to be paid out of my Bank Stock," and then had sold out all the Consols in her lifetime, or given the whole of them by a codicil to *A. B.*, would that prevent the legacy being charged on her Bank Stock? I apprehend not. So, also, if she says, "If the personal estate is not sufficient, then it is to be paid out of the real estate." I do not see the distinction between the two cases. She has increased the charge on the other fund, but that, in my opinion, is the whole of what she has done.

Therefore I am prepared to state my opinion, and, if desired, to make a declaration, that the effect of the codicil is to give the whole of the personal estate; that the specific legacy of £300 is revoked by the inconsistent disposition of the property by the codicil, but that the pecuniary legacy of £200 is charged upon the real estate, and must be paid out of that fund, the personal estate having proved insufficient.

Solicitors for the Plaintiff: Messrs. *Rickards & Walker.*

Solicitors for the Defendants: Mr. *Johnston;* Messrs. *Eyre & Lawson.*

M. R.

1866

Jan. 13, 15.

MILES *v.* MILES.

Will—Leasehold—Subsequent purchase of reversion—1 *Vict. c.* 26, *s.* 24.

Devise by will made since the *Wills Act* by the description of "my messuage, partly freehold, and partly leasehold, No. 3, *C. Street*," to specific devisees, with a declaration of testator's wish that the same should not be sold, and devise of residuary estate upon trust for sale. Testator subsequently purchased the reversion of the leasehold part of the messuage:—

Held, that the whole of the messuage passed by the specific devise.

HENRY MILES, by his will, made in 1862, devised (among other hereditaments) a messuage by the following description:—"All that my messuage, partly freehold and partly leasehold, No. 3, *Cannon Street*, being erected partly on my freehold ground there and on ground held by me of the Governors of *St. Thomas's* Hospital," to his trustees, upon trust for his wife for life, or, as to the leasehold premises, for so long as the term and interest in the said leasehold premises should exist, but subject to keeping down the ground-rents and other outgoings, with remainder, after her decease, to his son for life, with remainder to his son's children, with successive remainders over to his two daughters, *Georgiana Haycock* and *Marianne Miles*, and their children; and the testator declared it to be his wish that the said hereditaments should not be sold. He also devised his messuage, No. 4, *Cannon Street*, by a similar description, to his trustees, upon trust for his daughter *Georgiana* for life, with remainder to her children with successive remainders over for his daughter *Marianne* and her children, and the testator's son and his children: and as to all the residue of his estate and effects not before disposed of, and such parts of his estate as might by events fall into or form part of his residuary estate, the testator gave the same to his trustees upon trust for sale, and to divide the proceeds between his wife and children equally.

The testator, at the date of his will, was entitled to the messuages comprised in the above devise as to part in fee, and, as to the rest, under leases from the Governors of *St. Thomas's* Hospital

from whom he subsequently purchased the reversion of the premises, but did not revoke or alter his will.

A question arose, whether the whole of the two messuages, including the after-purchased reversions therein, passed under the specific devises, or under the residuary gift; and the present suit was instituted by the trustee of the will, that the rights of the persons interested in the premises might be determined. The testator's widow and his daughter, *Marianne Miles*, contended that the property passed under the residuary gift. The testator's son and his daughter, *Georgiana Haycock*, claimed it under the specific devises.

Mr. *Whately*, for the Plaintiff.

Mr. *Hobhouse*, Q.C., and Mr. *Blackmore*, for the residuary devisees:—

The freehold interest in the houses in question would have passed by the residuary gift under the old law. If a testator had given a leasehold interest by his will, and afterwards purchased the reversion, that reversion would have gone to his heir-at-law, and the leasehold would have been merged: *Capel* v. *Girdler* (1). Where a will contains a description of the property which cannot apply to the state of the property at the testator's death, there you have a case which will exclude the operation of section 24 of the *Wills Act*, 1 Vict. c. 26.

In *Emuss* v. *Smith* (2), where a testator had devised property, which he described as "a leasehold garden," near *Falsam Pits*, and afterwards purchased the reversion, it was held that the bequest of the leasehold garden was adeemed by the subsequent conveyance of the fee to the testator, and formed part of his residuary freehold estate. The authority of this case is recognised in Lord *St. Leonards'* Real Property Statutes (3). In *Douglas* v. *Douglas* (4), there is a *dictum* of Vice-Chancellor *Wood*, which supports the present contention:—"In *Cole* v. *Scott* (5), Lord *Cottenham* says, what every one must agree in thinking correct, that the intention of the testator is not to be altered; and if it be clear that the testator is not referring to a general class of property,

(1) 9 Ves. 509. (2) 2 De G. & Sm. 722. (3) P. 365.
(4) Kay, 400, 404. (5) 1 Mac. & G. 518.

M. R. 1866 MILES v. MILES.

but to something specific, the new statute is not to have the operation of passing property which evidently was not in the contemplation of the testator, where the subject of the gift appears to have been defined and marked out by him as existing at the period when he is speaking."

In the present case, there is a "contrary intention" indicated by the will to prevent the application of section 24 of the Act. The specific description of the property, and the insertion of the word "my" before the gift, shews such intention: *Goodlad* v. *Burnett* (1). In *Blagrove* v. *Coore* (2), where there was a specific bequest of furniture in the testator's house in *Gloucester Square*, which he afterwards removed to another house, the furniture was held not to pass by the specific bequest. On these grounds, we contend that the freehold interest passes under the residue.

Mr. *Selwyn*, Q.C., and Mr. *C. Chapman Barber*, for those interested in the specific devises:—

Under the old law a will operated as a conveyance, and a man could not convey that which he did not possess, therefore subsequently acquired property did not pass under the 1 Vict. c. 26, s. 24. A will speaks from the testator's death, unless a contrary intention appears by the will. The words relied on as descriptive of the property in this will are mere surplusage, and afford no proof of an intention that the will shall not speak from the death. Here we have an express gift of "my messuage, partly freehold and partly leasehold," and being a gift of leasehold, it is, by operation of law, coupled with a burden, and there is no indication of a contrary intention such as the residuary devisees contend for. It cannot be presumed that the testator intended to make a severance between his freehold and leasehold interest. He expressly declared his wish that No. 3, *Cannon Street*, shall not be sold, while he gave his residuary estate upon trust for sale. If there had been an error in the description, that would not have made the bequest void, nor if he had purchased part only of the reversion. The case of *Goodlad* v. *Burnett* (1) is an authority in our favour, for the messuages being partly of leasehold tenements, were capable of increase by the purchase of the reversion or of

(1) 1 K. & J. 341. (2) 27 Beav. 138.

decrease, so that the case comes within the principle there laid down by Vice-Chancellor *Wood* (1): "When a bequest is of that which may be increased or diminished, then, I apprehend, the *Wills Act* requires something more on the face of the will for the purpose of indicating such 'contrary intention' than the mere circumstance that the subject of the bequest is designated by the pronoun '*my*.'" The case of *Emuss* v. *Smith* (2) is distinguishable, for the part of the will on which the case is reported is that relating to the property described as "my freehold estate at *Brickhouse Lane*, which I purchased of Mr. *Brooks*." There part of the property was leasehold, and the testator, after the date of his will and codicil, purchased the reversion, and it was held that the property did not pass, but there he gave nothing which he had not purchased of Mr. *Brooks*. As to the leasehold near *Falsam Pits*, it is doubtful from the report whether the point was really decided. In the case of *Re Otley & Ilkley Railway* (3), where there was a devise of the house in which *A.* now resides, with the appurtenances therewith occupied, two fields purchased after the date of the will, and enjoyed with the house till the testator's death, were held to pass with the devise. Again, in *Hibon* v. *Hibon* (4), a gift of "my messuage and premises, situate No. 4, *Turnham Green Terrace*," was held to include a garden severed from, but held with, the testator's house. On these grounds it is submitted that no "contrary intention" appears from the will, and that the whole interest in these houses passes to the specific devisees: *Struthers* v. *Struthers* (5).

Jan. 15. LORD ROMILLY, M.R., after stating the part of the will relating to Nos. 3 and 4, *Cannon Street*, continued:—

After the date of the will the testator bought the reversion of the leasehold messuages, so that the term became merged in the fee, and the question is whether this merger revoked the bequest of the leasehold interest. Reference was made to section 24 of the *Wills Act*, which is as follows:—"Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately

(1) 1 K. & J. 349. (2) 2 De G. & Sm. 722. (3) 13 W. R. 851. 34 Beav 525 11 Jur N S 818
(4) 11 W. R. 455. (5) 5 W. R. 809.
9 Jur N S 571

M. R. 1866 MARTIN v. MARTIN.

before the death of the testator, unless a contrary intention shall appear by the will." I think that if this will had been executed just after the testator had purchased the reversion, it is clear that it would have operated as a gift of the whole messuage, though a misdescription. I am of opinion that what is given by the will is the messuage itself, and that the rest of the clause "partly freehold and partly leasehold," is a mere description. It is to be observed that he gives it "for so long as the term or interest therein shall exist." But even under the old law, if the testator had renewed the lease, that would not have revoked the gift. I am of opinion that the effect of the purchase of the reversion only operated as an addition to that which was described as before existing. In the case of *Re Otley & Ilkley Railway* (1) I held that where a testator had devised a house, with the appurtenances therewith enjoyed, and had afterwards bought two fields that were enjoyed with the house so devised till his death, the devise included the whole. The same principle applies here.

I am confirmed in this view of the case by the argument that the testator declared it to be his wish that the messuage No. 3, *Cannon Street*, should not be sold, by which he must have intended the whole messuage, whereas the residuary estate is given to the trustees upon trust for sale. It is scarcely possible that he can have intended that the freehold interest should go one way and the leasehold interest another way. It was his clear intention that the whole messuage should go to the specific devisee. The description was an accurate one at the time his will was made, and, after the purchase of the reversion, he did not think it necessary to describe it again.

I have looked at the other cases cited, but the only one which touches this is *Emuss* v. *Smith* (2), which is distinguishable, for here it is evident, from the face of the will, that the testator intended the description to apply to the messuage itself. There will be a declaration that the whole of the two messuages passed by the specific devises.

Solicitors: Messrs. *Meredith & Lucas.*

(1) 13 W. R. 951. (2) 2 De G. & Sm. 722.

In re LATHROPP'S CHARITY.

M. R.
1866
Jan. 20, 22.

Lands Clauses Act, s. 80—*Costs.*

Where land belonging to trustees of a charity had been taken by a railway company under an Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, and the purchase-money paid into Court, and the Court, by a former order, had directed the trustees to apply the money so paid, or to be paid, for the purpose of improving the supply of water to the town where the charity property was situated:—

Held, that the costs of an application by the trustees for payment to them of the fund in Court to be applied for that purpose, must be borne by the company under s. 80 of the said Act.

THIS was a Petition by the trustees of *Lathropp's* Charity, in the town of *Uttoxeter*, for the payment out of Court of a portion of a sum of stock, which represented the purchase-money of a piece of land belonging to the said trustees, and taken by the *North Staffordshire Railway Company*, under their Acts of 1846 and 1847, with both which Acts the *Lands Clauses Consolidation Act*, 1845, was incorporated. The purchase-money had been paid into Court, and invested by order of the Court. By an order made by the Master of the Rolls on the 22nd of April, 1865, on the Petition of two of the trustees, it was ordered that the trustees of the charity should be at liberty to take such steps as they might think necessary or proper for the purpose of improving the supply of water to the town of *Uttoxeter*, and for the purpose of raising such sum or sums of money as might be necessary, in addition to the accumulated arrears of income, and the money paid or to be paid by the *North Staffordshire Railway Company* (meaning the fund to which the present Petition related), for effecting that object, but the works were not to be commenced, nor was any mortgage to be actually executed, till the contract and plans had been submitted to and approved by the Judge at Chambers, and the trustees were to be at liberty to apply at Chambers to make such payments as it might be, from time to time, necessary to make for these purposes.

The Petition stated that the contracts and plans of the works

M. R. 1866 *In re* LATHROPP'S CHARITY.

sanctioned by the last-mentioned order had been submitted to and approved by the Judge in Chambers, and that the Petitioners had been empowered to pay a certain proportion of the sum due; that the works had been commenced, and a large sum was now due to the contractor, to meet which the Petitioners were desirous of having the fund in Court sold and the proceeds paid to them.

The Petition prayed that the sum of stock therein mentioned might be sold, and the proceeds paid to the Petitioners, to be applied for the purposes mentioned in the order of the 22nd of April, 1865, and that the railway company might pay such costs of the present application, and the order to be made thereon, as their Acts might render them liable to pay.

The only question in the case was as to the liability of the railway company to pay the costs under section 80 of the *Lands Clauses Consolidation Act*, 1845.

Mr. *Wickens*, for the Petitioners:—

In the present case we only ask for the costs of the Petition for the payment of money out of Court under section 80 of the *Lands Clauses Consolidation Act*. There appears to be some conflict of authority on this point. In the case of *Re Oxford, Worcester, & Wolverhampton Railway Company* (1), your Lordship refused to fix the company with the costs of the application, on the ground that the question was settled by *Re Buckinghamshire Railway Company* (2), and held that the costs must come out of the fund in Court. But the question has since come before Vice-Chancellor *Wood* in *Re Incumbent of Whitfield* (3), which was a case where the purchase-money of glebe land taken by a company was ordered to be paid to the incumbent for building a parsonage house. In that case His Honour held that the company must bear the costs of the Petition for the payment of the money out of Court. The present case is the same as if it were a Petition for payment of the money to a person absolutely entitled, and on principle, as well as by the provisions of the 80th section of the Act, the costs ought to be borne by the company: *Hodges* on Railways (4).

(1) 27 Beav. 571. 6 Jur. N.S. 478
(2) 14 Jur. 1065.
(3) 1 J. & H. 610. 7 Jur. N.S. 190
(4) 3rd ed. 456.

M. R.
1866
In re LATHROPP'S CHARITY.

Mr. *W. J. Bovill*, for the Railway Company:—

The company should not be fixed with the costs of this application. The case is governed by *Re Buckinghamshire Railway Company* (1) and *Re Oxford, Worcester, & Wolverhampton Railway Company* (2). The only adverse case is that of *Re Incumbent of Whitfield* (3), where Vice-Chancellor *Wood* said: "The costs would be payable by the company if the money were actually laid out on land. The proposed building is, in my opinion, an investment authorized by the statute, and the case, therefore, falls within the words of the 80th section—the costs of orders for payment of the principal out of Court." The object of the present application, however proper, is one not authorized by the statute. The case last cited cannot be taken as an authority for holding that costs of applications, for whatever purpose, should be borne by the company. The purposes for which moneys deposited in Court under the Act are to be applied are defined by the 69th section, which would not include such an application as the present.

Mr. *L. Field*, for other parties.

Mr. *Wickens*, in reply.

Jan. 22. LORD ROMILLY, M.R.:—

In this case I have looked at the various authorities, and at the Act of Parliament, and, after examining them carefully, I am of opinion that the company should pay the costs of the Petition.

In the case of *Re Buckinghamshire Railway Company* (1), the present Lord Chancellor held that the company was not liable to pay the costs of a Petition for the payment out of Court of money to be laid out in the erection of buildings; and I followed the same course in *Re Oxford, Worcester, & Wolverhampton Railway Company* (2), considering myself bound by that decision. I find that the subject has since been brought before Vice-Chancellor Sir *W. P. Wood*, in the case of *Re Incumbent of Whit-*

(1) 14 Jur. 1065. (2) 27 Beav. 571. 7 Jur. N.S. 670.
(3) 1 J. & H. 610. 7 Jur. N.S. 909.

M. R. 1866 *In re* LATHROPP'S CHARITY.

field (1), and His Honour there considered that the company was bound to pay the costs.

I have again referred to the Act, in its application to the present case. It is to be observed that the Act is a remedial Act, and ought, therefore, to be construed liberally. It may be that when the money in Court is paid out expressly for the purpose of being laid out in buildings, though it may be right that the company should not pay increased costs, the more correct course would be that the costs should be apportioned; but when the application is, in substance, for the money to be paid to a particular person, then the more proper course seems to be for the company to pay them. The present Petition is, in substance, either for payment of the money out of Court to some one absolutely entitled, or for the purpose of re-investment. In either view of the case, the costs of the application must be paid by the company.

Solicitors for the Petitioners: Messrs. *Field & Roscoe.*
Solicitors for the Respondents: Messrs. *Burchell & Co.*

M. R. 1865 *Dec.* 9, 11.

In re INSOLE.

Married Woman—Wife's reversionary Interest—Mortgage—Judicial Separation —20 & 21 Vict. c. 85, *s.* 25—*21 & 22 Vict. c.* 108, *s.* 8.

Where a married woman entitled to a reversionary interest in personalty has joined with her husband in mortgaging such interest, and has afterwards obtained a decree of judicial separation, and is living apart from her husband,—on the property coming into possession she is entitled to it absolutely under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8.

THIS was a Petition for the payment of a sum of money out of Court, under the following circumstances:—

George Insole, by his will, directed his executors to pay the interest of a share of his estate to *Thomas Insole* for life, and after his decease to divide it equally among his children living at his decease, when they should severally attain the age of twenty-two years. The testator died in 1831.

(1) 1 J. & H. 610.

M. R.
1865
In re
INSOLE.

Thomas Insole died in 1865, leaving six children, one of whom was the Petitioner, *Eliza Puckle*, who had attained the age of twenty-two, and had married *Alfred Puckle*.

By two several indentures of mortgage made in 1854 and 1858, the said *Alfred Puckle* and *Eliza* his wife assigned the reversionary interest of *Eliza Puckle*, under the testator's will, to different mortgagees, for securing the sums of £125 and £100 respectively.

In 1863 a decree was made in the Court for Divorce and Matrimonial Causes, on the Petition of *Eliza Puckle*, for judicial separation from her husband, and since that time she had lived apart from him.

By an indenture of the 1st of March, 1864, *Eliza Puckle* assigned to *T. Britten* and *G. Wilkinson* her share in the estate of the testator by way of mortgage for securing £315 and interest. The share of *Eliza Puckle* under the testator's will had been paid into Court, and the present Petition was presented by her, and by *T. Britten* and *G. Wilkinson*, her mortgagees under the deed of the 1st of March, 1864, for payment to the last-named mortgagees of the amount due on their incumbrance, and for payment of the residue of the fund to *Eliza Puckle* for her separate use.

By the Act of 20 & 21 Vict. c. 85, s. 25, it is enacted that "In every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her, and such property may be disposed of by her in all respects as if she were a *feme sole;* and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had then been dead."

By the Act of 21 & 22 Vict. c. 108, s. 8, it is enacted that, "Where a wife has obtained a decree for judicial separation under the last-mentioned Act, the property of or to which the wife is possessed or entitled for an estate in remainder or reversion at the date of the decree shall be deemed to be included in the protection given by the decree."

Mr. *Bagshawe*, for the Petitioners, contended that under the

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above sections *Eliza Puckle* was entitled to the fund, subject to the mortgage of the 1st of March, 1864.

Mr. *Schomberg*, for the first mortgagees of the husband and wife:—

If this application is granted, no one can safely advance money on the security of the interest of a married woman, unless it is in possession. The proper order would be for payment of the dividends to Mrs. *Puckle* for her separate use during her life, just as if she were living apart from her husband and he had become bankrupt. The judicial separation cannot alter the antecedent rights of parties who have previously entered into contracts, except to protect the wife in the usual way. In the case of *Re Whittingham's Trust* (1), a reversionary interest of a wife which had fallen into possession after the date of her desertion, was held to be included in the protection order, but there Vice-Chancellor *Wood* ordered payment of the dividends to the separate use of the wife. The same order ought to be made here.

Mr. *Speed*, for the other mortgagee of the husband and wife:—

The mortgagees of Mrs. *Puckle* cannot be entitled to priority over the mortgagees of herself and her husband under a mortgage before the decree for judicial separation. A mortgage so made of the wife's reversionary interest would only be defeasible on the death of the husband, before the property came into possession. The words in section 25 of 20 & 21 Vict. c. 85, relating to the wife being considered as a *feme sole* with respect to property devolving on her, should be construed as meaning her property, subject to mortgages previously made. The 8th section of 21 & 22 Vict. c. 108 does not extend the operation of the former Act except to include reversionary interests. He referred to *Purdew* v. *Jackson* (2).

SIR J. ROMILLY, M.R.:—

I am of opinion that the Petitioners are entitled to an order in this case. In fact, all that is done by the mortgage of a reversionary interest of a married woman, although the wife joins in it, is merely to mortgage the interest of the husband; it does not

(1) 12 W. R. 775. (2) 1 Russ. 1, 70.

affect the interest of the wife at all; it is solely a mortgage of the interest of the husband. It may be that the mortgagee who advances the money takes his chance, and runs the risk, that in future the time may come when the husband will be able to acquire the property, and give it to him in respect of the incumbrance; but that is all that he does.

In this case the 25th section of the 20 & 21 Vict. c. 85, in my opinion, disposes of the right of the husband. The moment the judicial separation takes place the right of the husband is gone, and the property belongs to the wife exactly in the same manner as if the husband were dead. The words of the clause are these:—[His Honour read the section.] If those words do not include the falling in of a reversion, I do not know what words could be used which would be sufficiently large for the purpose. It is quite clear that what is mortgaged here is a reversion that is to come to the wife. A husband might, if he pleased, mortgage the probability of a legacy being paid to his wife; and that would be perfectly good if the legacy were paid in his lifetime; but if the husband died before the payment of the legacy took place, the mortgage would be good for nothing. The clause, having referred to property of every description which the wife may acquire, proceeds: "and such property may be disposed of by her in all respects as if she were a *feme sole*." How may a *feme sole* dispose of property? She may sell it, she may mortgage it, or she may squander it. Then why am I to cut down those words, and say she is only to dispose of the interest of it? "And on her decease the same" (that is, the property) "shall, in case she shall die intestate, go as the same would have gone if her husband had then been dead." Does not that say that it shall be disposed of by her in all respects as if she were a *feme sole?* She may leave it to whomsoever she pleases, and if she dies intestate, it is to go just as if her husband were dead—which excludes him; in other words, she may leave it to whom she pleases, or she may assign it to whom she pleases. The meaning of that clause is that, as soon as the judicial separation takes place, the wife may dispose of all the property which, in the ordinary sense of the word, comes to her, exactly as if she were not married, subject always to what may take place in case she shall return to live with her husband.

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I am, therefore, of opinion that the Petitioners are entitled to an order. The Respondents, the prior mortgagees, cannot be allowed their costs out of the fund.

Solicitors for the Petitioners: Messrs. *J. & J. H. Pearce.*

Solicitors for the Respondents: Messrs. *Taylor, Hoare, & Taylor.*

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Specific Performance—Agreement for Lease—Option—Waiver.

Under an agreement to let a house for three years at a yearly rent, by which the landlord agreed, at the request of the tenant, to grant him a lease for a term from the expiration of the three years' occupancy, at the same rent, the tenant undertaking to keep the house in repair:—

Held, that the tenant was entitled, four years after the expiration of the three years' occupancy, to have the agreement for a lease specifically performed, and that neither an application made by him two years previously for a lease at a reduced rent (which was refused), nor an application to the landlord for payment of an amount expended in repairs (which had been allowed to the tenant), amounted to a waiver of his rights, though the Plaintiff was bound to refund the cost of the repairs.

THIS was a suit for the specific performance of an agreement for the lease of a house.

By a memorandum of agreement, entered into the 30th of November, 1857, between the late *D. W. Wire*, of the one part, and the Plaintiff, *E. Moss*, of the other part, *D. W. Wire* agreed to let, and the Plaintiff to occupy, the house therein mentioned, at the yearly rent of £111, for a period of three years, to be computed from Christmas then next; and *D. W. Wire* agreed, at the request of the Plaintiff, to grant him a lease of the premises for five, seven, fourteen, or twenty-one years from the expiration of the aforesaid three years' occupancy, at the same rent; that the Plaintiff should, during his occupancy, keep the premises in good and substantial and ornamental repair; and that during and after the said three years' occupancy, *D. W. Wire* should have all the landlord's usual rights to compel payment of rent, if neglected.

The Plaintiff continued to occupy the premises, but no formal lease was executed.

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In November, 1860, *D. W. Wire* died, having by his will appointed the Defendants, *S. Barton* and *J. B. Wire*, his executors. The rent was paid by the Plaintiff to *D. W. Wire* during his life, and afterwards to the Defendants.

The Plaintiff, in 1864, claimed to be entitled to exercise his option for a lease under the said agreement; and the present suit was instituted for specific performance of that agreement, the Plaintiff alleging that he had never waived or abandoned his right.

The Defendants, by their answer, stated that they were not aware of the existence of the agreement till some time after their testator's death; that in 1862 the Plaintiff applied for a lease of the premises for seven, fourteen, or twenty-one years, at a reduced rent, to which proposal they declined to accede, and the Plaintiff then continued to occupy the house as tenant from year to year; that the Plaintiff, though bound to repair the house at his own expense if the agreement were subsisting, applied to the Plaintiffs for £16 8*s*. for the expense of repairing the front of the house, which sum the Defendants paid. They submitted that the Plaintiff was not now entitled to claim a lease, and that, if that right continued after the expiration of the three years' occupancy, the Plaintiff had waived and abandoned it.

Mr. *Baggallay*, Q.C., and Mr. *Rigby*, for the Plaintiff:—

The agreement made in 1857, though void as a demise, was yet good as an agreement for a lease: *Parker* v. *Taswell* (1). The Plaintiff's option to require a lease still continues, though the three years have elapsed: *Hersey* v. *Giblett* (2). It is no answer to say that the Defendants were ignorant of his right, which he was entitled to exercise at any time during the tenancy. The fact of calling on the landlord to repair was not a waiver of the lease, though it was an error on his part, and he is bound to refund the money: *Richardson* v. *Gifford* (3). There has been no such laches as to bar a suit for specific performance: *Clarke* v. *Moore* (4). The application for a reduction of rent was no waiver, for even an alteration in rent has been held not to alter a tenancy: *Digby* v.

(1) 2 De G. & J. 559. (3) 1 Ad. & E. 52.
(2) 18 Beav. 174. (4) 1 J. & Lat. 723.

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Atkinson (1). Even if there has been a waiver on the part of the Plaintiff, yet, according to the principle of *Hersey* v. *Giblett* (2), the acceptance of rent by the Defendants on the old terms has reinstated him in his rights. They referred also to *Dann* v. *Spurrier* (3); *Price* v. *Dyer* (4).

Mr. *Southgate*, Q.C., and Mr. *Surrage*, for the Defendants:—

It is clear from the conduct of the parties that the intention was that application should be made for the lease before the three years had expired. The conduct of the Plaintiff in applying for a reduction of rent and for the sum of £16 8*s.* to be laid out in repairs, was inconsistent with the presumption that his option still remained, and was a waiver of his right. The case of *Hersey* v. *Giblett* (2) is distinguishable. The request for a lease ought to have been made in a reasonable time, and when it was first made by the Plaintiff, it was for a different lease from that contemplated by the agreement.

Lord Romilly, M.R.:—

I am of opinion that the Plaintiff is entitled to a decree. Under the original document, which was an agreement for a lease, the Plaintiff is entitled to call on the Defendants for specific performance, unless he has done something to bar his rights, at any time afterwards. There was nothing to prevent his continuing as tenant from year to year after the three years had expired, and the right to require a lease still existed. The Defendants say that they did not know of the original document; but they had notice of it by the Plaintiff's application. Why did they not, at the end of 1862, call on the Plaintiff to exercise his option? They allowed him to continue in occupation, though they knew that the option continued till the agreement was carried into effect or waived. The case of *Hersey* v. *Giblett* (2) shews that a person entering into an agreement of that description may execute it at any time, if no time is stipulated for within which it is to be exercised, unless the landlord calls upon him to do so and he makes default, in

(1) 4 Camp. 275.
(2) 18 Beav. 174.
(3) 7 Ves. 231.
(4) 17 Ves. 356.

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which case the landlord may determine the tenancy. The application on the part of the Plaintiff to be paid the £16 8s. expended in repairs was not a waiver of the contract, though the Plaintiff in so doing mistook his right, and he is bound to repay the money. I am of opinion that he is entitled to a decree for specific performance, and the costs must follow the event.

Solicitor for the Plaintiff: Mr. *E. Moss.*
Solicitors for the Defendants: Messrs. *Plews & Irvine.*

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M. R. 1866 Jan. 13, 18; Feb. 8.

Bankruptcy—Option to take a Lease—Bankrupt Act, 1849, *s.* 141—*Lease—Usual Covenants—Proviso against Alienation.*

The option to take a lease is comprised under the words "personal estate and effects, present and future," in the *Bankrupt Law Consolidation Act*, 1849, s. 141. Such option passes to the assignees in bankruptcy, and may be sold by them and assigned to the purchaser, unless the lease is to contain a proviso against alienation.

Under a stipulation that the lease should contain all usual covenants to protect the interest of the lessor:—

Held, that a covenant against alienation was not a usual covenant.

THE Defendant, *John Papillon*, was the owner of certain offices and cellars on the basement of No. 5, *Waterloo Place, Pall Mall*, for a long term of years. By a memorandum in writing, dated the 27th day of September, 1856, the Defendant agreed to let, and *George Frederick Bloxam* agreed to take, these offices and cellars, for a term of three years, at a rent of £60, from the 29th of September, 1856. The memorandum then proceeded, "And it is further agreed that the said *John Papillon* shall, whenever called upon so to do by the said *George Frederick Bloxam*, grant a lease to him at his, the said *George Frederick Bloxam's* expense, of the before-named offices and cellars at the rent of £60 per annum for a period of three years, seven years, or the remainder of the term from this date that the said *John Papillon* has at present in his power to grant, such lease to contain all the usual covenants for protecting the interest of the

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said *John Papillon*." Then followed provisoes that *Bloxam* should not carry on any business of an offensive description, or that might be contrary to the covenants in the lease under which *Papillon* held: that *Bloxam* should give six calendar months' notice in writing of his intention to leave or give up possession of the premises previous to the expiration of the terms of three years or seven years, or any other term that might be granted to him, and that he should on quitting deliver up the premises in as good a condition as then existing, reasonable wear and tear excepted.

Bloxam entered into possession of the premises, and continued to occupy them till October, 1864, without applying for a lease. On the 13th of that month he became bankrupt. In December, 1864, the assignee in bankruptcy sold the interest of *Bloxam* under the above agreement to the Plaintiff, and by a memorandum in writing, dated the 31st day of January, 1865, agreed, when so required, to do and execute all such acts, deeds, matters, and things in the law for the purpose of assigning and assuring his estate and interest as such assignee in the premises comprised and described in the agreement of the 27th of September, 1856, and also in and under the same agreement, as the Plaintiff, his executors, administrators, or assigns should be advised to be necessary for carrying the sale into effect.

The Plaintiff took possession of the premises, and shortly afterwards the Defendant caused a notice to quit to be served upon him. Thereupon he filed this bill for specific performance of the agreement of the 27th of September, 1856.

The Defendant demurred for want of equity, and also, *ore tenus*, for want of parties.

Mr. *Jessel*, Q.C., and Mr. *Willan*, for the demurrer:—

First, *Bloxam* ought to have exercised his option to take a lease within the term of three years for which he originally agreed to take the premises: *Hersey* v. *Giblett* (1); *Stocker* v. *Dean* (2).

[The MASTER OF THE ROLLS referred to *Moss* v. *Barton* (3), where he had held the contrary.]

(1) 18 Beav. 174. (2) 16 Beav. 161. (3) Law Rep. 1 Eq. 474.

35 Beav. 97

Second. The option was purely personal to *Bloxam*, the agreement not containing the word "assigns." If not, *Bloxam's* right under the agreement was not such an interest in land as would pass to the assignee in bankruptcy, but was rather in the nature of a power which he might exercise in the place of the bankrupt under 12 & 13 Vict. c. 106, s. 147. The assignee therefore was the proper person to apply for the lease, and ought to have been a party to the suit: *Dowell* v. *Dew* (1).

Third. Even if the option did pass to the assignee, still it was not an "estate" or "interest," and therefore did not pass to the Plaintiff by virtue of the memorandum of the 31st of January, 1865.

Mr. *Hobhouse*, Q.C., and Mr. *W. W. Cooper*, for the bill:—

If this were a simple agreement for a lease there can be no doubt that the benefit of it would pass to the assignees in bankruptcy: *Crosbie* v. *Tooke* (2); *Morgan* v. *Rhodes* (3); and it is wholly immaterial that the word "assign" is not contained in the agreement: *Church* v. *Brown* (4); *Brooke* v. *Hewitt* (5). Can it make any difference that *Bloxam* has under this agreement the right to a lease if he chooses, instead of being bound to take one if the lessor insists on it?

By the Bankrupt Acts all the bankrupt's interests in land are vested in the assignee, except leases and powers. As to leases, the assignee may elect whether he will take them or not; here, having signed the memorandum of the 31st of January, 1865, the assignee must be deemed to have elected to take the lease. Again, the powers to which the Acts refer are powers to be exercised by the bankrupt, and in the absence of which he would take no interest; such powers are not property at all: *Vaughan* v. *Vanderstegen* (6). But *Bloxam's* interest under the agreement was property; property, however, to become his on the condition of his exercising an option. It was not the less property that it was subject to a condition. As to it being necessary that the option should be exercised within the term of three years, there is no

(1) 1 Y. & C. Ch. 345.
(2) 1 My. & K. 431.
(3) 1 My. & K. 435.
(4) 15 Ves. 258.
(5) 3 Ves. 253.
(6) 2 Drew. 165.

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trace of any agreement to that effect; and *Bloxam* having continued in possession after the expiration of that period must be deemed to have held over on the terms of his original holding: *Essex* v. *Essex* (1).

Mr. *Jessel*, in reply.

Feb. 8. LORD ROMILLY, M.R., after stating the facts, continued:—

The Defendant has demurred to this bill, contending that there is nothing to be found in the Bankrupt Act of 1849 which enables the assignee to assign an option of this character. The section which relates to this matter is the 141st section of 12 & 13 Vict. c. 106, which is not repealed or affected by the subsequent *Bankrupt Act*, 24 & 25 Vict. c. 134. This section is in these words. [His Lordship then read the section.] This is followed by the 147th section as to powers. I think that the original lessee who became bankrupt did nothing to disentitle himself to exercise the option he had of calling on the Defendant to grant him such a lease as is stated in the agreement. I had recently to consider a similar point in *Moss* v. *Barton* (2), where I held that the fact of the lessee holding on with the consent of the lessor did not destroy the original agreement, or enable the lessor successfully to contend that it had been waived.

I think the only question upon this demurrer is whether the option which belonged to the bankrupt passed to his assignees.

The proviso to grant a new lease at the option of the lessee forms part of the agreement of the 27th of September, 1856, which is entered into for a valuable consideration. It is therefore, in my opinion, a contract made with *Bloxam* by the Defendant, and the performance of which *Bloxam* might have enforced at any time before his bankruptcy unless he had waived or abandoned it, which, as I have already stated, in my opinion he did not on the facts stated in this bill.

I am of opinion that the whole of his interest in this contract must be included in the words "personal estate and effects present and future," of the 141st section of the Act of 1849.

(1) 20 Beav. 442. (2) Law Rep. 1 Eq. 474.

35 Beav. 197.

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I should have considerable doubt whether the bankrupt's option to take a lease could be held to be a power within the 147th section of that Act, but I think that the option is part of the interest contained in the agreement, and that the whole of the interest in that agreement is part of the personal estate of the bankrupt.

The agreement of the 27th of September, 1856, is not one which requires any skill or discretion for its performance by *Bloxam*, and it could therefore be assigned by him, unless an intention to the contrary can be collected from the contents of the agreement itself. If the agreement had contained a proviso that the lease should not be assigned, then I think that the option to take a new lease would not have passed to the assignees, unless with the consent of the Defendant.

In *Weatherall* v. *Geering* (1), Sir *William Grant* refused to order the intended lessors to execute such a lease when the intended lessee had assigned his interest under the agreement, and had also taken the benefit of an Act for the relief of insolvent debtors. In this judgment Sir *William Grant* appears to doubt whether the specific performance of an agreement for a lease not containing such a proviso could be enforced in favour of the assigns of the intended lessee; but if that was his opinion it is in that respect overruled by the Lord Chancellor in the case of *Crosbie* v. *Tooke* (2), where he enforced specific performance of such an agreement in favour of the assignee of the intended lessee who had become bankrupt; and at the same time he distinguished that case from *Weatherall* v. *Geering* (1), by the circumstance that, in that latter case, the lease to be granted was to contain a covenant not to assign without the license of the lessor; and the next case of *Morgan* v. *Rhodes* (3) is to the same effect. And this seems to have been the principle also which governed the case of *Dowell* v. *Dew* (4), on which the Defendant relied. In that case a lease for fourteen years was granted to *William Dowell*, which contained a proviso that the same should be forfeited if the lessee, his executors, administrators, or assigns, should alien, &c., without the consent of the lessors. A short time before

(1) 12 Ves. 504.
(2) 1 My. & K. 431.
(3) 1 My. & K. 435.
(4) 1 Y. & C. Ch. 345.

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the determination of the lease an agreement was entered into by the lessors with *John Dowell*, in whom the lease was then vested, to grant to him another lease for fourteen years "on the same terms as the last." On a suit for specific performance brought by *Thomas Dowell*, the brother and alienee of *John Dowell*, the Lord Justice *Knight Bruce*, who was then Vice-Chancellor, held that the Plaintiff was not entitled to have a lease granted to him without giving to the lessors the personal liability of *John Dowell* for the due performance of the covenants. This case was brought by appeal before Lord *Lyndhurst* as Chancellor, who affirmed the decree of the Vice-Chancellor, but, as appears by the report (1), expressly upon the ground that a clause against alienation had been inserted in the first lease, which governed the agreement with *John Dowell*. He says, "I am of opinion that if *John Dowell* had continued in possession under the agreement, his possession could not have been disturbed, and he might have enforced the granting of the renewed lease. The next objection is founded upon the assignment, without license, of *John Dowell*, the tenant, to his brother *Thomas*. If a lease had been granted in pursuance of the agreement, and that lease had been assigned, it would have been a forfeiture, but such forfeiture might have been waived. The question, however, remains to be decided whether, with reference to the object of the present suit, the same principle would apply to this agreement. It is clear that, if it were not for the clause against assigning without leave, the agreement would be binding, and might be enforced by *Thomas Dowell*, the assignee."

In the agreement in the case before me of the 27th of September, 1856, there is no intimation that the lease to be granted is to contain any clause against assignment, unless it be in the proviso that the lease shall contain the usual covenants for the protection of the lessor, and in the absence of the word "assigns." With regard to the first, I am of opinion that a proviso, that the lessee shall not assign without the consent or license of the lessor, is not a usual covenant; and as to the absence of the word "assigns" from the agreement, having regard to the case of *Church* v. *Brown* (2), I am of opinion that the absence of this word from an agreement for a lease (which is not, I apprehend, very unusual) cannot have the

(1) 12 L. J. (N. S.) Ch. 164.

(2) 15 Ves. 258.

effect of preventing the agreement and interest under it from vesting in the assignees in bankruptcy of the intended lessee; and if it vests in the assignees in bankruptcy, it is clear that it may be assigned by them.

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I am also of opinion that the instrument which purports to assign this interest from the assignee in bankruptcy to the Plaintiff is sufficient for that purpose, and that the right to enforce the option is, upon the statements contained in this bill, vested in the Plaintiff. I am of opinion, therefore, that the demurrer must be overruled.

Solicitors for the Plaintiff: Messrs. *Ingle & Gooddy.*
Solicitor for the Defendant: Mr. *C. B. Hallward.*

In re HOP AND MALT EXCHANGE AND WAREHOUSE COMPANY. *Ex parte* BRIGGS.

M. R. 1866 *Feb.* 8, 13.

Companies Act, 1862, *s.* 35—*Rectification of Register—Prospectus—Memorandum of Association—Misrepresentation—Notice—Acquiescence.*

A person who would otherwise be entitled to set aside a contract on the ground of fraud, cannot do so if, after discovering the fraud, he has acted in a manner inconsistent with the repudiation of the contract.

Where, therefore, a person was induced to take shares in a company on the faith of representations contained in the prospectus, which he afterwards discovered to be false, and subsequently to the discovery instructed his broker to sell the shares:—

Held, that his name could not be removed from the register.

Semble, if a prospectus of a company states that the articles of association may be seen at a certain place, a person taking shares on the faith of the prospectus, and without inspecting the articles, must be held to do so with notice of the contents of such articles, provided they do not contain anything incompatible with the prospectus.

THIS was an application under section 35 of the *Companies Act*, 1862, that the register of members of the above company might be rectified, by striking out the name of the Applicant, Mr. *Briggs*.

M. R. 1866 *Ex parte* Briggs.

The company was formed some time about June, 1865, and the memorandum of association was registered in July following. Shortly afterwards, a prospectus was issued, headed, "The *Hop & Malt Exchange & Warehouse Company* (*Limited*), incorporated under the *Companies Act*, 1862." It stated that the company proposed to provide warehouse accommodation for the stowage of hops, and also malt, and other produce compatible with the stowage of hops; also, to provide space for private and general offices, stowage of stocks and samples, and show-rooms, together with every requisite for the complete accommodation of tenants and shareholders. Subscription and refreshment-rooms were to be provided; and a club was to be established, for the convenience of growers, country dealers, and brewers. The greater portion of the proposed building was to be devoted to properly-classified fire-proof warehouses and offices, which were to be especially adapted for hop merchants and maltsters, but would also be suitable for other trades. If no allotment of shares was made, the deposits were to be returned; and, finally, it was stated that the articles of association might be seen at the solicitors', and at the temporary offices of the company.

On the faith of this prospectus, and without having seen either the memorandum or articles of association, Mr. *Briggs* applied for shares in the company; and, on the 28th of July, he received a certificate that eight shares had been allotted to him.

By the memorandum of association, the objects of the company were stated, amongst other things, to be "for advancing money to growers, merchants, or factors, upon the security of their crops and produce, whether growing, or stored in the company's warehouses, or in bond, or upon the security of dock or other warrants, or property of a like description; and, otherwise, for the accommodation of hop and other merchants, maltsters, factors, brewers, and others connected with the hop or malt trades, and the doing of all such other things incidental or conducive to the attainment of the above-mentioned objects, or any or either of them."

The 69th clause of the articles of association was in part as follows:—"It shall be lawful for the directors, from time to time, to make advances of money upon hops and other produce to the growers, producers, or sellers thereof, and to such other persons as

they shall think fit, and upon such security, negotiable or otherwise, as they shall deem expedient."

About three weeks after the shares were allotted to Mr. *Briggs*, he instructed his broker to sell them. The broker accordingly entered into an agreement for the sale of them at a considerable premium, but, in consequence of the committee of the Stock Exchange refusing a settling-day, the sale could not be carried out. On the 24th of August, soon after the decision of the Stock Exchange Committee, Mr. *Briggs* applied to the secretary of the company to take back his shares; and this being refused, he subsequently made the present application, on the ground that the prospectus contained false representations as to the objects of the company.

On being cross-examined, Mr. *Briggs* admitted that he had given his instructions to his broker to sell the shares after having seen the articles of association.

Mr. *Southgate*, Q.C., and Mr. *Brooksbank*, in support of the application, relied on *Ship's Case* (1). The statement in the prospectus, that the articles of association might be seen at a certain place, did not affect Mr. *Briggs* with notice of their contents: *Rawlins* v. *Wickham* (2). The company cannot complain that Mr. *Briggs* has believed its own statements.

Mr. *Selwyn*, Q.C., and Mr. *Roxburgh*, for the company:—

The company was registered when it issued the prospectus; and that fact is stated in the prospectus. That, of itself, is sufficient to give notice of the contents of the memorandum of association, as has been repeatedly held. Besides, the prospectus states expressly that the articles of association may be seen at certain places: this is an invitation to the public to go and look at them; it is impossible to state everything in the prospectus. *Ship's Case* (1) was totally different from this; for there the company was not registered when the shares were applied for, and, after the application had been made, the promoters registered a memorandum, according to which the objects of the company were totally different from those stated in the prospectus.

But Mr. *Briggs'* conduct is enough to put him out of Court: he

(1) 13 W. R. 450, 599. (2) 3 De G. & J. 304.

M. R. 1866 *Ex parte* Briggs.

gave instructions to sell his shares after he knew quite well what the articles of association contained. It is clear that he comes here only in consequence of a settling-day being refused on the Stock Exchange.

They referred to *Bell's Case* (3); *Holt's Case* (4); *Parbury's Case* (5).

Mr. *Southgate*, in reply:—

It cannot make any difference whether the prospectus was issued before or after registration. The simple question is, were the contracting parties at one when they entered into the contract? *Lindley* on Partnership, pp. 23, 1107.

Feb. 13. Lord Romilly, M.R., after stating the effect of the prospectus, the memorandum of the association, and the 69th clause of the articles, continued:—

Most certainly under these clauses the society might become a mere bill-discounting society, and it is in my opinion equally certain that there is nothing in the prospectus to lead to such an expectation. The strong inclination of my mind is, however, after the last clause in the prospectus, that any person applying for shares must be deemed to have notice of the contents of the articles of association. He is informed of their existence, and is, in fact, thereby invited to examine them, in order to test the truth of the prospectus.

I admit the correctness of the argument founded on those cases which lay down that a man cannot complain that his solemn assertion has been believed and acted upon; and if the prospectus had contained a clause withholding the power contained in the 69th clause of the articles of association, or the clause in the memorandum of association which I have read, I should not have held that any person taking shares could have been fixed with knowledge of clauses in the articles diametrically opposed to and contradicted by the prospectus. But in all these cases, and in all those matters which are not contradictory to the prospectus, but are compatible with it, I think that the applicant for shares cannot plead ignorance of the clauses of the articles of association,

(1) 22 Beav. 35. (2) 22 Beav. 48. (3) 3 De G. & Sm. 43.

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which profess to execute the objects of the prospectus, even if they go somewhat beyond it, unless they are wholly incompatible with it. I cannot, however, but admit that the articles of association go very much further than the prospectus, and indeed contain powers which the prospectus would not induce any one to expect to find in them; and I do not mean to express any opinion, whether I could, if it turned on that point alone, hold that these clauses are or are not inconsistent with the prospectus, or at variance with it to such an extent as to amount to a fraudulent misrepresentation, and thus enable the Applicant to get rid of his shares. But I think, in the circumstances of this peculiar case, and upon the evidence before me, it is not necessary to decide that question, for it is established by the evidence given on the cross-examination of Mr. *Briggs*, that after he was acquainted with the provisions of the articles of association he consented to keep the shares, and exercised acts of ownership over the shares wholly inconsistent with the repudiation of them. He gave instructions to his broker to sell the shares for the account, and the contract was actually entered into by the broker for that purpose, at a premium of 50s. per share, in accordance with such instructions, and all this was done after Mr. *Briggs* had obtained notice of the articles. I think, on the evidence, that it was the refusal of the committee of the Stock Exchange to give a settling-day to the company, the effect of which was to annul the conditional contract entered into by his broker for the sale of Mr. *Briggs's* shares, that opened his eyes to the injurious effect of the articles of association, and induced him to repudiate his shares, and to require that they should be cancelled. The dates, I think, shew this. It is clear that it was the determination of the committee of the Stock Exchange, and not the contents of the articles of association, that induced Mr. *Briggs* to require his shares to be taken back; and I consider that his acting as owner of the shares, and endeavouring to sell them after knowledge of the articles, is an acquiescence therein, and that he cannot now complain of this, or ask to have his money returned to him. I must therefore refuse the application.

Solicitor for Mr. *Briggs:* Mr. *Pulbrook.*
Solicitors for the company: Messrs. *Thompson & Debenham.*

M. R.
1866
Feb. 12.

MULLINS *v.* HUSSEY.

Practice—Sale under Decree of the Court—Defendant having conduct of Sale—Bad Title—Costs of Purchaser.

A Defendant, to whom the conduct of a sale under the decree of the Court is given, will not be ordered to pay in the first instance, where there are no funds in Court, the costs of a purchaser who is discharged from his purchase on the ground of bad title.

THIS was an adjourned summons.

By the decree on the hearing of the cause, dated the 25th of July, 1863, it was ordered that certain lands should be sold, and that one of the Defendants, *William Stephens*, a mortgagee in possession of the property to be sold, should have the conduct of the sale.

In October, 1863, *John Parr* was certified to be the purchaser of part of the property, and in June, 1864, the Defendant *Stephens* took out a summons for the payment of the purchase-money into Court, whereupon an order was made for an inquiry as to title. In July, 1865, the chief clerk certified that a good title could not be made. In November, 1865, the Master of the Rolls, upon the application of the Plaintiff, made an order varying the certificate by stating that a good title could be made, and giving no costs of the application; the Lords Justices in December, 1865, discharged this order, but made no order as to costs.

The purchaser now applied to be discharged from his purchase, and to have his costs, charges, and expenses occasioned by his bidding and being allowed the purchaser, and of and incident to the present application and the application of the Defendant *Stephens* to compel payment of the purchase-money into Court and of the order directing an inquiry as to title and of the proceedings thereunder, paid by the Defendant *Stephens*, but without prejudice to the question out of what fund or by whom such costs should be ultimately borne or paid.

Mr. *Hobhouse*, Q.C., and Mr. *Surrage*, for the Applicant:—

The rule is, that the costs of a purchaser, who is relieved from

his purchase on the ground of bad title, are paid out of the funds in Court in the cause: *Perkins* v. *Ede* (1); but if there is no fund in Court, then by the Plaintiff in the first instance, without prejudice to how they are ultimately to be borne: *Smith* v. *Nelson* (2); *Berry* v. *Johnson* (3); *Seton* on Decrees (4); *Lord St. Leonards'* Vendors and Purchasers (5); the ground of the rule being that the Plaintiff, having the conduct of the sale, is in the position of a vendor; but in this case the Defendant is in that position, and the greater part of the purchaser's costs have arisen from his application to compel the payment of the purchase-money. He ought, therefore, to pay these costs in the first instance. If, however, the Court should not think fit to make the Defendant pay the costs, it will reserve to the applicant the right of claiming to have them paid out of any fund coming into Court in the cause.

Mr. *Jessel*, Q.C., and Mr. *Rawlinson*, for the Defendant *Stephens*:—

There is no precedent for such an order against a Defendant. The conduct of the sale does not make him a Plaintiff, or fix him with the Plaintiff's liabilities. In sales under decrees the Court is the vendor, and it is only when there are funds coming into Court that a Plaintiff is ordered to pay a purchaser's costs in the first instance. At all events, the costs of the Plaintiff's application to vary the chief clerk's certificate ought not to be paid by the Defendant. If the applicant had only sought to be discharged, and to reserve his right to have his costs out of any funds coming into Court, there would have been no opposition, and the summons would not have been adjourned into Court; he must, therefore, pay the costs of this application.

Mr. *Beales*, for the Plaintiff, asked for his costs of the application.

LORD ROMILLY, M.R.:—

I cannot make the Defendant pay these costs, but I will give the applicant liberty to apply for payment of his costs out of any

(1) 16 Beav. 268.
(2) 2 S. & S. 557.
(3) 2 Y. & C. Ex. 564.
(4) P. 1210 (3rd edit.).
(5) P. 107 (14th edit.).

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funds that may come into Court to the credit of the cause, and such funds will not be paid out without notice to him. He will be entitled to his costs, charges, and expenses occasioned by his bidding for and becoming the purchaser of the property, and of the proceedings consequent thereon, including the costs of the summons to vary the certificate, but not the costs of the appeal nor the costs of this application. The costs of the other parties will be costs in the cause.

Solicitors for the Applicant: Messrs. *Hicks & Son.*
Solicitors for the Defendant: Messrs. *Bannister & Fache.*
Solicitors for the Plaintiff: Messrs. *Walter & Moojen.*

M. R. 1866 Feb. 15, 16.

PRINCE *v.* PRINCE.

Sc 35 Beav 386. 12 Jur NS 221

Company—Contract signed by Agent—Joint Stock Companies Act, 1856 (19 & 20 *Vict. c.* 47), *s.* 41—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 206.

34 Beav 47. 10 Jur NS 1065

The power of making contracts in writing, signed by their agents, conferred by the 41st section of the *Joint Stock Companies Act*, 1856, upon Companies registered under that Act, is "a right or privilege acquired under" that Act within the meaning of the 206th section of the *Companies Act*, 1862, and is consequently not affected by the repeal of the former Act.

THIS was the hearing, on motion for decree, of a suit for the administration of the estate of *Samuel Prince*, an intestate, and for a declaration of the validity of a contract made by the intestate for the sale of certain freehold property to the *Manchester Royal Exchange Proprietors.*

The *Manchester Royal Exchange Proprietors* are a company registered under the *Joint Stock Companies Acts*, 1856 and 1857. By their rules a committee of management is empowered to purchase property for the purposes of the company, with the previous sanction of an annual or special general meeting in every case where the purchase-money exceeds £2000.

On the 23rd of December, 1864, *Henry Forth*, as the agent of *Samuel Prince*, wrote to the committee of the company a letter in these terms:—"On behalf of *Samuel Prince*, I beg to make an

offer to sell to your proprietors his property in *Market Street*, now in the several occupations of *W. B. Browne* and *G. B. Westmacott*, or their under-tenants, for the sum of £22,000, to be paid on or before the 1st of July next ensuing. This offer is made subject to the existing leases. If it be accepted as to price, a formal contract will have to be prepared by Mr. *Prince's* solicitors and yours. The offer is in force and open to your acceptance until the 1st of March next."

This letter was laid before a meeting of the committee on the 29th of December, at which it was resolved, "that the offer of Mr. *Prince's* property for the sum of £22,000 be accepted, subject to the approval of a general meeting of the proprietors."

On the 11th of January, 1865, a special general meeting of the company was held, at which it was resolved, that it was desirable to erect a new Exchange on land described in the resolution, which included the property in question; and it was further resolved, "that as the committee have procured offers from the owners of the properties included in the preceding resolution, which will be required for effecting the purposes aforesaid, they are hereby authorized to accept such offers respectively, with or without alterations or modifications, as they may find expedient:" and further, "that the committee may take and adopt such measures as they may deem necessary in relation to all or any of the matters aforesaid." At a meeting of the committee held immediately afterwards it was resolved, "that Mr. *Heelis*, the solicitor of the company, be instructed to take such steps as he may think desirable for carrying out the resolutions adopted at the general meeting."

On the 9th of February *Heelis* wrote to *Forth* a letter in these terms: "I am authorized by the committee of the *Manchester Royal Exchange* to accept the offer which you made to them on the 23rd of December of Mr. *Prince's* property in *Market Street*, which I accordingly do. Will you instruct his solicitor to send me the draft of the formal contract?" No other contract was signed, but *Prince's* solicitor sent the abstract of title to the company's solicitor, and it was arranged that the time for completion of the purchase should be postponed till Christmas, 1865.

On the 22nd of July, 1865, *Prince* died intestate, leaving a

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widow, an infant son and heir, and four infant daughters. On the 4th of October the widow took out administration to his estate.

The suit was instituted by the daughters against the widow, the son, and the company.

The company were desirous to complete the purchase, and the Bill prayed that the infant heir might be declared a trustee for them, and that a person might be appointed to convey the property in his name.

The 41st section of the *Joint Stock Companies Act*, 1856, enables contracts to be made on behalf of companies registered under the Act, "in writing signed by any person acting under the express or implied authority of the company."

The *Companies Act*, 1862, repeals the Act of 1856, but the 206th section provides that no repeal thereby enacted shall affect, 1, anything duly done under any Acts thereby repealed; 3, any right or privilege acquired or liability incurred under any Act thereby repealed.

Mr. *W. M. James*, Q.C., and Mr. *Bedwell*, for the Plaintiffs:—

The letters of the 23rd of December, 1864, and the 9th of February, 1865, constitute a complete contract. *Heelis*, in signing the letter accepting *Prince's* offer, acted under the express authority of the company; the contract is therefore binding on the company under the 41st section of the Act of 1856, that section coming within the saving clause in the *Companies Act*, 1862.

Mr. *Birley*, for the company, in support of the validity of the contract, cited *Gibbins* v. *North Eastern Metropolitan Asylum District* (1).

Mr. *Little*, for the heir:—

The Act of 1856 is totally repealed by the Act of 1862, and its provisions are, by Part VI. s. 176, made applicable to companies registered under the earlier Acts, the object of the Legislature being to make one law for all companies. The words "right or privilege" in the 206th section of the Act of 1862 refer, not to the subsequent exercise of powers conferred by the repealed Acts, but to rights and privileges arising from acts done before the passing of

(1) 11 Beav. 1.

the Act of 1862 in accordance with the provisions of the repealed Acts; *e.g.*, the right of enforcing contracts not under seal made before the passing of the Act of 1862. The 41st section of the Act of 1856 being repealed, the company, like any other corporation, can only bind themselves by contracts under their common seal. But, assuming that they had power to contract by writing signed by their agent, the resolution of the 11th of January was not a sufficiently definite sanction of the proposed purchase to comply with the rules of the company; the resolution did not mention *Prince's* offer, and, even if it impliedly sanctioned the acceptance of the offer, the stipulation for a formal contract annexed to that offer was an essential stipulation which was never waived either by *Prince* or by the company.

Mr. *W. M. James*, in reply:—

The words "anything done under the Acts hereby repealed," in the 206th section of the Act of 1862, are sufficient to include all that, according to the contention of the other side, is meant by "any right or privilege." The latter words must therefore have some other meaning, and they naturally apply to the continuation of privileges such as that conferred by the 41st section of the Act of 1856.

The reference to a formal contract was mere surplusage, the essential terms of the contract being contained in the letters.

Feb. 16. LORD ROMILLY, M.R.:—

I am of opinion that a case is made out for the specific performance of this contract. In the first place, I think that the letter of Mr. *Prince's* agent to the committee of management, and Mr. *Heelis'* letter in reply, together constitute a contract which, if made between private persons, would be a valid and complete contract. The reference in those letters to a more formal contract does not, in my opinion, affect the question. The subject-matter and the price to be paid being specified in the letters, nothing more was required to ascertain the terms of the contract.

The next question to be determined is, whether Mr. *Heelis*, in

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entering into this contract, was acting under the authority of the company. I think it is apparent, from the words of the resolution of the general meeting of the 11th of January, 1865, that Mr. *Prince's* offer, which the committee of management had previously resolved to accept, subject to the approval of the general meeting, was laid before the proprietors at that meeting, and that they expressly authorized the committee to accept such offer, and to take such measures as they might deem necessary in relation to the matter. That was, in my opinion, a sufficient compliance with the rules of the society, which require the previous sanction of a general meeting to a purchase by the committee where the purchase-money exceeded £2000. The committee thereupon appointed Mr. *Heelis* their agent for the purpose of carrying out the resolutions, and he, as such agent, wrote to accept Mr. *Prince's* offer.

This therefore is, in the words of the 41st section of the *Joint Stock Companies Act*, 1856, a "contract made on behalf of the company in writing, signed by a person acting under the express or implied authority of the company," and is "binding upon the company and upon the other party thereto," unless that section is no longer in force. Now the whole of the Act of 1856 is repealed by the *Companies Act*, 1862; but it is expressly provided by the 206th section of the latter Act, that such repeal shall not affect "any right or privilege" acquired under any Act thereby repealed. It is clear that these words, "any right or privilege," were not intended to refer to any thing done before the repealing Act was passed, that case being provided for by the previous part of the same section; it must therefore be some right or privilege subsisting at the time of the passing of the Act of 1862 to which these words refer. And I am of opinion that the power of making valid contracts in writing signed by the agent of the company, is such a right or privilege as the Legislature intended by this section to preserve unaffected by the repeal of the Act of 1856. I must, therefore, declare that this is a contract binding on the company and on the heir of Mr. *Prince*.

Solicitors for all parties: Messrs. *N. C. & C. Milne*.

In re TAYLOR'S ESTATE.

DAUBNEY *v.* LEAKE.

M. R.
1866
Feb. 9.

Practice—Administration Suit—Costs—Proceedings in Chambers.

In an administration suit by a residuary legatee, other residuary legatees, served with notice of the decree and having liberty to attend the proceedings, will not be allowed their costs of attending the taking of the accounts in Chambers, unless the Plaintiff and the accounting Defendant employ the same solicitor, and in that case will be allowed one set of costs between them.

THIS was a suit, commenced by summons, for the administration of the estate of *Frances Taylor*. The testatrix, who died in 1822, by her will and codicil, bequeathed her residuary personal estate (in the events which had happened) to and equally among her first cousins living at the death of her mother, which took place in January, 1852.

The summons was taken out by one of the residuary legatees, and the administration order directed an inquiry as to the first cousins of the testatrix living at her mother's death.

Several residuary legatees, having been served with notice of the order, obtained liberty to attend the proceedings, proved their relationship, and attended the taking of the accounts.

The Plaintiff and the Defendant were represented by the same solicitor.

The suit now came on for further consideration, and the question arose, whether the costs of the residuary legatees of the proceedings in Chambers should be paid out of the estate.

Mr. *Elderton*, for the Plaintiff.

Mr. *Nugent*, for the Defendant.

Mr. *Speed*, Mr. *E. K. Karslake*, Mr. *Nalder*, and Mr. *F. T. White*, for different residuary legatees, submitted that, having been served with notice of the order, and having liberty to attend, they were entitled to their costs of attending the proceedings in Chambers.

M. R. 1866 DAUBNEY v. LEAKE.

LORD ROMILLY, M.R. :—

The residuary legatees are entitled to their costs of proving their relationship; but I do not give parties, whose interest is the same as that of the Plaintiff, their costs of attending the taking of the accounts. As, however, in this case the Plaintiff was represented by the same solicitor as the Defendant, who is the accounting party, I will allow the other residuary legatees one set of costs of attending the taking of the accounts, to be divided equally between them.

Solicitor for the Plaintiff and the Defendant: Mr. *T. H. Dixon.*

Solicitors for the residuary legatees: Messrs. *Taylor, Hoare, & Taylor;* Messrs. *Tooke & Holland;* Mr. *Paddison;* Messrs. *Coverdale & Co.*

M. R. 1866 *Feb.* 27.

In re COLLEY'S TRUSTS.

Settlement—Trust for Children—Shares vesting at Twenty-one—Accruer.

By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one.

There were five children, of whom four attained twenty-one, and the fifth died an infant:—

Held, that the whole fund vested in the four children who attained twenty-one.

THIS was a Petition for the payment out of Court of a sum of £1397 consols transferred into Court under the *Trustee Relief Act* by the trustees of the marriage settlement of *Augustus Keppel Colley* and *Elizabeth* his wife, formerly *Elizabeth Smith.*

By the settlement, which was dated the 4th of November, 1805, the sum of £7000 consols was settled by *James Dick,* a relation of Mrs. *Colley,* upon trust for Mrs. *Colley* for life, and after her death upon trust that the trustees should sell the stock, and pay, apply, and dispose of the proceeds "unto and amongst all and every the child and children of the said *Augustus Keppel Colley* on the said

Elizabeth Smith to be begotten in equal shares and proportions;" and if there should be but one such child, then should pay, assign, and transfer the whole to such only child; "and the same shall be a vested interest in and be paid to such child or children at his, her, or their age or ages of twenty-one years; and if any such child or children shall have attained his, her, or their age or ages of twenty-one years in the lifetime of the said *Elizabeth Smith*, then the parts or shares of such child or children so attaining the age of twenty-one years shall be respectively considered as vested interests in such child or children so attaining the said age; but the actual payment thereof shall be postponed until six calendar months after the decease of the said *Elizabeth Smith*, when the same shall be respectively paid to such child or children." Then followed the usual trusts for maintenance of infant children after the death of Mrs. *Colley*, and accumulation of the surplus income of their shares; and it was declared that, in case there should be any child or children or issue of the marriage born alive, and such child or children should all happen to die under the age of twenty-one years, then the trustees should, after the death of Mrs. *Colley*, and from and after the death of such child or children severally and respectively under the age of twenty-one years, stand possessed of the trust funds in trust for Mr. *Colley*, his executors, administrators, and assigns; but if it should happen that there should not be any issue of the marriage born alive, then the trustees should, from and after the decease of Mrs. *Colley*, and such failure of issue, stand possessed of the trust funds, in trust for *James Dick*, his executors, administrators, and assigns.

The settlement did not contain any clause of survivorship and accruer as to the shares of children dying under twenty-one.

There were five children of the marriage; four attained twenty-one, and one of these afterwards died; the fifth, *Augustus Frederick Colley*, died an infant: Mrs. *Colley* died in July, 1865; and a question having arisen whether the one-fifth share of the trust fund, which would have belonged to *Augustus Frederick Colley* if he had attained twenty-one, was divisible among the other four children of the marriage, or was undisposed of and resulted to the settlor, the trustees transferred this share into Court under the *Trustee Relief Act*.

M. R. 1866 *In re* Colley's Trusts.

The three surviving children, and the representative of the child who died after attaining twenty-one, thereupon presented this Petition for the payment of the fund in Court to them in equal shares.

Mr. *Archibald Smith*, for the Petitioners, was stopped by the Court.

Mr. *Roupell*, for the representative of *James Dick*, the settlor:—

Under the trusts of this settlement, one-fifth of the fund is undisposed of. The trust is for all the children in equal shares, and there were five children. Each child, therefore, took one-fifth share; and though the direction that shares should vest at twenty-one prevented the child who died under twenty-one from taking his share, it does not alter the class of children to whom the fund was originally given, and there is no gift over of his share to the survivors.

There has been no decision upon the question; but the practice of conveyancers, who have always inserted a proviso of survivorship and accruer after a trust in this form, proves the general opinion to be that, without such a proviso, the children who attain twenty-one will not take the whole fund: 4 *Martin's* Conveyancing (1).

Mr. *Freeling*, for the trustees.

Lord Romilly, M.R.:—

I cannot accede to the view taken in the note which has been cited. It would amount to this—that a gift of £100 to the children of *A.*, who has ten children, is the same thing as a gift of £10 to each child of *A.* I am of opinion that this is a trust for a class, namely, the children of the marriage who attain twenty-one, and that if I decided otherwise I should be breaking a sound rule of construction. The whole fund, therefore, was divisible among the four children who attained twenty-one, or their representatives.

Mr. *A. Smith* referred to *Russel* v. *Buchanan* (2) as confirmatory of his Lordship's view.

Solicitors for all parties: Messrs. *Roberts & Simpson.*

(1) P. 437, *n.* (2) 7 Sim. 628.

WESTERN *v.* MACDERMOT.

M. R.
1865-6
Dec. 6, 7; Jan. 12. 1866

Building Covenant—Breach—Right to sue—Covenant running with Land—Substantial Injury—Acquiescence—Pleading—Parties.

A covenant against building entered into by a purchaser of land with the vendor (who was also owner of adjoining lands), his heirs and assigns, runs with the land, and may be enforced in equity by a subsequent purchaser of part of such adjoining lands. The vendor after selling part of the adjoining lands cannot release the covenantor from his covenant.

The person seeking to enforce such a covenant in equity must shew that he will sustain substantial injury from the breach of it; but the injury need not be so great as is required to justify the interference of the Court in cases of obstruction of ancient lights.

A person who has acquiesced in breaches of such a covenant is not debarred of his remedy in equity, provided the breaches have not caused substantial injury.

All the persons entitled to the benefit of such a covenant need not be parties to or represented in a suit to enforce it.

THE Plaintiff and the Defendant *MacDermot*, were the respective owners of the adjoining houses, Nos. 10 and 9, *Brock Street*, in the city of *Bath*. The object of the suit was to restrain *MacDermot* from erecting a certain building in the rear of his house.

The houses in question are situated on the south side of *Brock Street*, No. 9 being the more easterly. The sites of both the houses, the gardens at the back, and a considerable part of the adjoining lands, were formerly the property of Sir *Benet Garrard*.

By indentures of lease and release dated respectively the 19th and 20th of December, 1766, Sir *Benet Garrard*, in consideration of a perpetual rent-charge of £220 reserved to him, his heirs and assigns, conveyed to *John Wood* in fee various parcels of land in the city of *Bath*, including the sites of the houses on the south side of *Brock Street*, and the gardens at the back thereof; such gardens being described as separated by a pathway from another piece of land, then also belonging to Sir *Benet Garrard*, and known as *King's Mead Furlong*, *Hayes Lower Furlong*, and *Hayes*. The release contained powers of distress and entry to Sir *Benet Garrard* to secure the payment of the rent-charge. *Wood*

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thereby covenanted for himself, his heirs and assigns, with Sir *Benet Garrard*, his heirs and assigns, to pay the rent-charge, and also within ten years to build houses upon the pieces of ground thereby released, according to the plan thereto annexed, to keep the houses and fences in repair, and, in case of fire, to build new houses of equal goodness and dimensions, and in the same manner as to height with the houses consumed; and it was thereby provided that if *Wood*, his heirs or assigns, should convey any part or parts of the premises thereby granted and released unto any person or persons in order for houses and buildings to be erected and built on the same (which it should be lawful for him or them to do), and should make Sir *Benet Garrard*, his heirs or assigns, party or parties to such conveyance (which Sir *Benet Garrard*, for himself, his heirs and assigns, thereby covenanted to join in in such manner as should be reasonable), and should in every such conveyance effectually charge the land and ground thereby granted with a perpetual rent-charge of not less than four shillings per foot of frontage, with the like powers of distress and entry for securing the same, and the like covenants as were therein contained, and should procure a counterpart thereof to be executed and delivered to Sir *Benet Garrard*, his heirs or assigns, then *Wood*, his heirs and assigns, should be released from all liability in respect of so much of the rent-charge as should be reserved by such conveyance, and in respect of his covenants as to the land conveyed. And Sir *Benet Garrard*, for himself, his heirs and assigns, covenanted with *Wood*, his heirs and assigns, that he, Sir *Benet Garrard*, his heirs or assigns, or any person claiming or to claim under him or them, should not at any time thereafter build or permit to be built any houses or buildings whatsoever upon any part of certain ground then of the said Sir *Benet Garrard* and his heirs distinguished in the said plan as the *King's Mead Furlong*, part of the *Hayes Lower Furlong*, and part of the *Hayes* (which now form part of *Victoria Park*), nor should nor would set or plant, or cause or permit to be set or planted, any trees or plantations whatsoever upon any part of the said *King's Mead Furlong* and the *Hayes* which should at any time grow so as to exceed eight feet high for the time being, and in case the above should be done, then and so often as it should

happen, it should be lawful for *Wood*, his heirs and assigns, to throw down and wholly reduce to the ground every such house or other building as occasion should require.

By indentures of lease and release dated respectively the 22nd and 23rd of May, 1767 (to the latter of which Sir *Benet Garrard* was a party), *Wood* conveyed the house No. 10, *Brock Street*, and the garden at the back, to *Charles Rodburn* in fee: and by the release a perpetual rent-charge of the proper amount was reserved to Sir *Benet Garrard*, his heirs and assigns, and there were therein contained powers of distress and entry, and covenants on the part of *Rodburn* similar to those in the release of the 20th of December, 1766. There was also therein contained a covenant by *Rodburn*, his heirs and assigns, with Sir *Benet Garrard* and *Wood*, and each of them, and their and each of their heirs and assigns, that the garden walls to the east, west, and south of the ground thereby granted should not exceed the level of the parlour floor, and that there should be no trees nor any building whatever in the said garden that should exceed that height, and no chimneys nor flues in any building to be erected in the said garden, and also that there should be no stable nor coachhouse erected on any part of the said thereby granted premises; and there was a covenant by Sir *Benet Garrard* with *Rodburn* not to build on *King's Mead Furlong*, part of *Hayes*, and part of *Hayes Lower Furlong*, to the same effect as that contained in the deed of the 20th of December, 1766.

The Plaintiff's title was derived under the last-mentioned conveyance to *Rodburn*.

By indentures of lease and release dated respectively the 15th and 16th of May in the same year, 1767, a conveyance in a precisely similar form had been made by *Wood* to one *John Freeman* of the house No. 9, *Brock Street*, and the garden at the back. Under this conveyance *MacDermot's* title was derived.

The rent-charge issuing out of No. 10, *Brock Street*, had become vested in a Miss *Elwes*, that issuing out of No. 9 in *William Tite*.

All the houses on the south side of *Brock Street* were built, with some trifling exceptions, on a uniform plan, in accordance with the provisions of the deed of the 20th of December, 1766, and

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the windows at the back commanded an extensive view of the country to the south of *Bath*.

In July, 1864, *MacDermot* began to erect a bow or circular projection at the rear of his house, which was at variance, not only with the express covenant in the conveyance to *Freeman*, but also with the plan annexed to the indenture of the 20th of December, 1766. It extended from the basement to the attics, and the extreme depth of it was about eight feet. Upon the Plaintiff being informed of what was about to be done, he caused a notice to desist to be served on *MacDermot*, and afterwards filed his bill against *MacDermot* alone, seeking relief partly on the ground that the proposed building would obstruct the access of light and air to his house, and partly on the ground that the erection of it would be a violation of the covenant against building in the garden, in the deed of the 16th of May, 1767. The former ground, however, was not much insisted on. On the 18th of August, 1864, a motion was made for an injunction before the Vacation Judge, and it was then arranged that the building should be proceeded with, *MacDermot* undertaking to pull down the whole or so much thereof as the Court, at the hearing, should direct, in case it should be of opinion that he was not justified in erecting it.

The Bill was afterwards amended by making *William Tite* a co-Defendant.

By his answer, *MacDermot* set up the following defences:— First, that the building was not erected in the garden at the rear of No. 9, *Brock Street*, but on the site of an area which had existed at the back of the house ever since it was built. The Court, however, held that it was erected in the garden within the meaning of the covenant.

Second, that it would be inequitable to allow the Plaintiff to enforce the covenant in question, because similar covenants had been broken both by the Plaintiff, and by the owners of other houses in *Brock Street;* and also because the covenant in the deed of the 20th of December, 1766, by Sir *Benet Garrard*, as to the land now forming part of *Victoria Park*, had not been observed. It appeared that trees from eight feet (the level of the parlour floor) to forty feet in height had been for many years growing in the gar-

dens of houses on the south side of *Brock Street;* and in the Plaintiff's garden there were a fig tree, a thorn tree, and a mulberry tree, above the prescribed level: the two former had from time to time been cut down to the level of the parlour floor, but the mulberry tree had not. In *King's Mead Furlong* and *Hayes* there were many trees above eight feet in height, and within and along the southern and western boundaries of *King's Mead Furlong* several cottages had been built. These cottages were half a mile distant from *Brock Street*, and, by reason of inequalities in the level of the ground, either could not be seen at all, or could only be just seen from the houses there.

Third, that the Defendant *Tite*, who was the proper person to sue at law on the covenant, had given his consent to the erection of the building. In reality, however, *Tite* held himself neutral between the parties.

The suit now came on to be heard, the building having in the meantime been completed. The Plaintiff, in an affidavit made in support of the bill, stated that the erection interfered with the access of the light and sun to his house; but he did not say to what extent, and the statement was contradicted by witnesses on the part of the Defendant. It appeared, however, that the view of certain hills to the south-east of *Bath* was entirely shut out from some of the windows of No. 10 by the building in question.

Mr. *Hobhouse*, Q.C., and Mr. *Haddan*, for the Plaintiff:—

The covenant which we seek to enforce was entered into with *Wood*, the vendor of the Defendant's property, and his heirs and *assigns*. *Wood* retained no interest in the property, but he had an interest in the adjoining lands; the covenant must, therefore, have been inserted in the conveyance for his benefit as the owner of such adjoining land. The Plaintiff is the "assign" of *Wood*, for he has purchased the adjoining house, formerly *Wood's* property; he is therefore entitled to enforce the covenant. *Child* v. *Douglas* (1) was referred to on the question of privity between the Plaintiff and the Defendant.

As to Sir *Benet Garrard's* covenant not having been observed, the breaches are not of any great moment; and in order to dis-

(1) Kay, 560; 5 D. M. & G. 739.

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entitle the Plaintiff to enforce his covenant, there must have been an entire alteration in the character of the place: *Duke of Bedford* v. *Trustees of the British Museum* (1); *Tulk* v. *Moxhay* (2); *Kemp* v. *Sober* (3). As to the trees growing in the gardens in *Brock Street*, they may be cut down at any time; and therefore, according to Lord *Cranworth's* observations in *Kemp* v. *Sober* (3), the Plaintiff is not debarred from relief.

Mr. *Selwyn*, Q.C., and Mr. *Charles Hall*, for the Defendant *MacDermot*:—

It is not shewn that the Plaintiff suffers any substantial injury; he is therefore not entitled to relief by way of injunction: *Clarke* v. *Clark* (4); *Elmhirst* v. *Spencer* (5); *Attorney-General* v. *Sheffield Gas Consumers Co.* (6).

Again, the Plaintiff sues as the assign of *Wood*, but he is only one of such assigns, and the others are not represented here. This suit ought to bind them all: *Child* v. *Douglas* (7); *Eastwood* v. *Lever* (8). It is clear that at law all the persons who are assigns of *Wood* must join in suing on the covenant: *Thompson* v. *Hakewill* (9).

Finally, the Plaintiff has himself broken his covenant, and this distinguishes the case from *Kemp* v. *Sober* (3) and *Tulk* v. *Moxhay* (2), in neither of which was the Plaintiff any way in fault. They referred to *Roper* v. *Williams* (10).

Mr. *H. M. Jackson*, for *Tite*, asked for his costs.

Mr. *Haddan*, in reply:—

Any person who is entitled to the benefit of a covenant, and can shew substantial damage, is entitled in equity to enforce the covenant. Here the access of light to the Plaintiff's house, and the view of the surrounding country (which renders these houses peculiarly valuable), are both obstructed. As to the question of parties, in *Eastwood* v. *Lever* (8) the covenant

(1) 2 My. & K. 552.
(2) 11 Beav. 571.
(3) 1 Sim. (N. S.) 517.
(4) Law Rep. 1 Ch. 16.
(5) 2 Mac. & G. 45.
(6) 3 D. M. & G. 304.
(7) 5 D. M. & G. 739.
(8) 33 L. J. Ch. 355.
(9) 11 Jur. (N. S.) 732.
(10) T. & R. 18.

was expressly entered into with persons who were trustees of the covenant for all persons entitled to the benefit thereof; these trustees were clearly necessary parties to the suit. Here it is not so, and the Plaintiff is entitled to sue, without making any of the other persons who are entitled to enforce the covenant parties to the suit: *Whatman* v. *Gibson* (1); *Coles* v. *Sims* (2).

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Jan. 12. LORD ROMILLY, M.R., after some preliminary observations, said:— 1866

This suit could not, in my opinion, have been maintained on the ground of obscuring ancient lights. If the owner of one of several houses in a row should, at the rear, throw out a building, the extreme depth of which at the centre of the circumference was eight feet, where the whole space was open, I am of opinion that the next-door neighbour could not, in ordinary circumstances, complain of this as such an injury to him as he was entitled to stop; but at the same time I am of opinion, on the evidence, that, notwithstanding this, the injury done to the two houses adjoining No. 9 is substantial. In the case of the Plaintiff's house, it intercepts the early rays of the sun, and it also partially obstructs the view from his window; and I have no doubt it would make his house and the house on the other side less sought after than others in the row, and lower their value in the market to an appreciable extent, though, I should infer from the evidence, probably not to any very considerable extent.

This case, therefore, does not depend on the doctrine of this Court relative to the obscuring of ancient lights, nor indeed is it so put by the Plaintiff. His case is, that he bought with the house the benefit of a covenant which prevented the owners of the ground on which No. 9, and also all the other houses in the row, are built from making any such building as that now complained of. The original existence of such a covenant is now established, and indeed is not denied. But the Defendant contends that the Plaintiff is not entitled to claim the benefit of such covenant on

(1) 9 Sim. 196. (2) Kay, 56; 5 D. M. & G. 1. 18 Jur 683.

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several grounds, which I will presently mention in detail, but to explain which it is necessary to state the circumstances under which the covenant was entered into. [His Lordship then entered into the history of the title, and, after disposing of the question as to whether the building was situated in the garden, proceeded as follows]:—

The next and most important matter urged in defence is, that there is no personal covenant entered into by the Defendant, and that, if it be a covenant running with the land, then the Defendant has for the building he has made the consent of the covenantee, Mr. *Tite*, who is the person in whom the perpetual rent-charge issuing out of the house No. 9 is now vested. It was very much for the purpose of considering this question, and also from the importance of this case to the rest of the city of *Bath*, that I reserved my judgment in this case; but I am of opinion that this defence also fails. I think that this is a covenant which runs with the land, that the Plaintiff is entitled to the benefit of the covenant, and that the owner for the time being of the rent-charge issuing out of the land has no power to release it, or to discharge the owner of any adjoining tenement from it. I am of opinion that the owner of every adjoining tenement is also bound by the same covenant, and is subject to the obligation to perform it. The covenant by which the Defendant is bound is a covenant entered into by *Freeman*, under whom the Defendant holds, with Sir *Benet Garrard* and Mr. *John Wood*, and each of them, and their and each of their heirs and assigns, that no building whatever in the garden attached to the house No. 9 should exceed the level of the parlour floor. The Defendant is the assign of *Freeman*, and the Plaintiff is the assign of Sir *Benet Garrard* and *John Wood*. The effect of the conveyance of the 23rd of May, 1767, is that Sir *Benet Garrard* and Mr. *Wood* have assigned to the Plaintiff the benefit of that covenant, and the right to enforce it. I say "to the Plaintiff," because it is the same thing whether it be done directly to the Plaintiff or through a line of persons under whom the Plaintiff claims; and I am of opinion that neither Sir *Benet Garrard* nor Mr. *Wood*, after assigning the messuage No. 10 to the Plaintiff, or to those who have since assigned to the Plaintiff subject to these cove-

nants, and who have transferred the benefit of these covenants to the Plaintiff as against the adjoining owner, could release the covenant, or discharge the Defendant from his liability to perform it.

Some technical arguments may be, and have been, raised as to the terms in which the covenant is entered into with the covenantees; but I am of opinion they do not affect the substance of the case. I consider it clear that if, immediately after the conveyance of the 16th and 17th of May, 1767, to *Freeman*, *Wood* had attempted, with or without the consent of Sir *Benet Garrard*, to build over the whole of the garden of the messuage No. 10, Mr. *Freeman* could have prevented that act; and that this Court would have granted an injunction for that purpose. I am also of opinion that the same right belonged to Mr. *Rodburn*, *è converso*, after the indentures of the 22nd and 23rd of May, 1767; and that this reciprocal right and obligation is handed down from successor to successor indefinitely, so that every one who receives a substantial injury by the breach of this covenant is entitled to the assistance of the Court for redress. I use the words "substantial injury," because it is, I think, clear that a mere nominal breach of covenant, which inflicted no injury at all, would not justify this Court in interfering; but the Court would, in that case, leave the parties to their remedy at law to obtain such compensation as they might be entitled to. But I have already observed that the conclusion I have arrived at on the evidence is that the circular projection of No. 9 to the extent of eight feet in the centre is a substantial injury to the owner of the house No. 10—one affecting to an appreciable extent his comfort, and also the value of his property.

And this immediately introduces the consideration of another ground of defence, which is prominently brought forward by the Defendant in his answer, which is, that this covenant has, by common consent, been wholly disregarded by the parties entitled to the benefit of it, including the Plaintiff himself. This defence consists principally in the fact that trees from eight to forty feet in height have for many years been growing, and are now standing, on the lands called *King's Mead Furlong* and the *Hayes;* and that, along the southern and western boundaries, cottages have been

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built, and are now standing, and that this has been acquiesced in by the Plaintiff and his predecessors. That, besides this, trees and shrubs from eight to forty feet in height have been growing, and are now standing, in the gardens of other houses forming the south side of *Brock Street;* and that, in particular, the Plaintiff himself had a fig tree, a thorn, and a mulberry tree, in his garden, which towered above the level prescribed in the covenant; and that, though the fig tree and the thorn have been lopped down to the prescribed level since the institution of the suit, the mulberry tree still continues to lift its head above the level to which it was limited by the covenant. In my opinion, this defence is also ineffectual. I am by no means satisfied that these trees are any injury at all to any of the houses in *Brock Street,* or that this Court would have granted an injunction to compel their being lopped to the prescribed level; and I am of opinion that the Plaintiff, because he has not complained of certain breaches of covenant, which, in my opinion, have inflicted no injury upon him, has not thereby debarred himself from complaining of a breach which does affect the value of his property. If this contention were the law, then, because the owner of the house No. 10 enjoyed the sight of trees and shrubs in *King's Mead Furlong,* and encouraged their being planted there, he would have rendered himself liable to have a row of houses built at the bottom of each garden, wholly shutting out a striking prospect from the back rooms of his house, and diminishing to some extent the free transmission of light and circulation of air. I am of opinion that he has not, by such means, lost the right to stop such injury to his property. But if the contention of the Defendant be correct, it would necessarily follow that the gardens to the south of these houses might be built on, by placing thereon an opposite row of houses, so as wholly to exclude the view and prospect, which might have mainly induced the Plaintiff to buy this house, relying on this covenant; and this might be done to an extent which would not amount to what the law would consider an interference with the ancient lights of the Plaintiff, while, unquestionably, a very serious diminution of value might thereby be inflicted on his property, though it could not be considered as a legal interference with his ancient lights.

It was suggested (slightly, however) that this suit ought to have

been instituted on behalf of all the other owners of the houses in *Brock Street;* but I am of opinion that one alone is entitled to ask for redress, although others should decline to do so, or should disregard the act complained of. It may also well be that the injury is principally, or almost entirely, felt by one or two of the owners, and that those who are further off sustain no inconvenience, in which case they could not be required to join in or support the application.

I am of opinion that the questions at issue in this case resolve themselves simply into these two: First, is the covenant entered into by those under whom the Defendant takes his property now in force, and one by which he is bound and which the Plaintiff can enforce? and, secondly, if this question is answered in the affirmative, has there been a substantial breach of it; or, in other words, has the Plaintiff's property been substantially injured by the erection constructed by the Defendant? I am of opinion that both these questions must be answered in the affirmative, and that the Plaintiff is entitled to a decree; and that, in pursuance of the undertaking entered into with the Plaintiff at the hearing of the motion for the injunction, the Defendant must remove the projection he has erected.

The costs must follow the event; the Plaintiff paying Mr. *Tite's* costs, and adding them to his own.

Solicitors for the Plaintiff: Messrs. *Western & Sons.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland,* agents for Messrs. *Stone, Chamberlayne, & King, Bath;* Messrs. *Hollingsworth, Tyerman, & Green.*

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Jan. 16;
Feb. 13.

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Will—Power—Execution of Power—'Last Will'—Contrary Intention—Wills Act (1 *Vict. c.* 26) *ss.* 24, 27.

B., by a will, made in 1858 specifically devised and bequeathed freehold, copyhold, and leasehold property, and gave all other real and personal estate, of which he should die possessed or should have power to dispose, upon certain trusts. By a voluntary settlement in August, 1862, *B.* conveyed all his freehold property upon trust, after his own death, for *E.* for life with remainder as *B.* should "by his last will or any codicil thereto," appoint, and in default of appointment in trust for *E.* in fee, and by the same settlement he disposed of all his leasehold and personal property. In November, 1862, *B.*, by an instrument purporting to be his last will and not mentioning any former will, appointed under the power in the settlement an annuity to be raised out of his freehold property, and devised all his copyhold property; but made no other disposition of freehold or personal property. Probate of both wills was granted:—

Held, that having regard to the terms of the power the testator had indicated an intention that the will of 1862 alone should operate as an execution of the power, and that consequently the specific and residuary devises in the will of 1858 were not a due execution of the power.

JOHN BUNN by a will, dated the 3rd of August, 1858, bequeathed several legacies, and gave to his brother *Christmas Bunn* and *Sarah* his wife life annuities of twenty pounds each, charged on his farm, part freehold and part copyhold, called *Humphries Farm*, and directed that they should be allowed to live rent free in the farmhouse; and, subject as aforesaid, he devised *Humphries Farm* and the stock, implements and effects thereon to his nephew *John Bunn*, his heirs, executors, administrators and assigns; and he devised three freehold houses in *Shoreditch* to his nephew *Thomas Bunn*, and two freehold houses in *Old Kent Road* to his niece *Ann Maton*; and he devised and bequeathed certain copyhold and personal estate to *Elizabeth Bunn* (otherwise *Elizabeth Ambler*); and he bequeathed certain leaseholds to *Ernest Augustus Harding*; and he devised and bequeathed a freehold estate at *Coopersale* and certain copyhold and leasehold estates to *Elizabeth Bunn* and *Ernest Augustus Harding*, upon trust for *Elizabeth Bunn* for life,

with remainder to such person or persons being of relationship to the testator by blood (except certain persons in the will named) as *Elizabeth Bunn* should by will appoint, and in default of appointment, in trust to sell, and divide the proceeds among such of fourteen persons therein named as should be living at the death of *Elizabeth Bunn;* and he gave all other real and personal estate which he should at his death be seised or possessed of or entitled to, *or over which he had or should have any power to dispose,* unto *Elizabeth Bunn* and *Ernest Augustus Harding,* upon trust to sell, and out of the proceeds to pay his debts, funeral and testamentary expenses and legacies, and to divide the surplus among his sisters *Ann Pettinger, Mary Kendall,* and *Harriet Pooley,* and his nephews *Francis, Thomas,* and *Jonah Pooley* in equal shares. And he appointed *Elizabeth Bunn* and *Ernest Augustus Harding* executors of his will, and revoked all his former wills and codicils, and declared that to be his last will and testament.

The testator by a codicil, dated the 8th of July, 1862, revoked all the devises, bequests and interests made and given by his will to *Christmas Bunn* and his wife, and to his nephew *John Bunn,* and made and gave the devises, bequests and interests so revoked to *Elizabeth Bunn* and *Ann Pettinger,* and in all other respects he confirmed his will. On the following day he made another codicil to the same effect and nearly in the same words as the former codicil.

By a voluntary settlement, dated the 16th of August, 1862, and executed by him in the presence of two witnesses, the testator conveyed *Humphries Farm* (except such part as was copyhold), the houses in *Shoreditch* and *Old Kent Road,* the estate at *Coopersale,* and certain freehold property at *Brighton,* and all other his freehold hereditaments and estate (if any) unto and to the use of *Caroline Wightman* and *Ann Pettinger,* their heirs and assigns, upon trust for himself for life, and after his death upon trust for *Elizabeth Bunn* for life, and after the death of the survivor upon such trusts, intents, and purposes as he *by his last will* or any codicil or codicils thereto should appoint, and for default of such appointment, and subject thereto, upon trust for *Elizabeth Bunn* her heirs and assigns; and he assigned all his leasehold and personal estates to the same trustees upon trust for himself for

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life, with remainder upon trust for *Elizabeth Bunn* for life, with remainder as *Elizabeth Bunn* should by her last will or any codicil appoint, and in default of appointment upon trust for *Elizabeth Bunn*, her executors, administrators and assigns.

On the 16th of November, 1862, *John Bunn* executed another testamentary instrument which was in these words:—

"This is the last will of me, *John Bunn*, of *Hill House, Westcott*, in the county of *Surrey*, Esquire. I do hereby by this my will, in pursuance of a power given and reserved to me by a deed of settlement, which deed bears date the 16th day of August, 1862, and is made between me the said *John Bunn* of the one part and *Caroline Wightman* and *Ann Pettinger* of the other part, give, devise and bequeath to my dear sister the said *Ann Pettinger* during her life an annuity or annual payment of £100 to be raised out of my freehold property, and I do hereby give, devise and bequeath all my copyhold property wheresoever to *Caroline Wightman*, of No. 1, *Moore Park Villas, Fulham Road, Fulham*, her heirs and assigns, and I appoint the said *Ann Pettinger* and *Caroline Wightman* executrixes hereof."

The testator died on the 30th of July, 1863, and the four testamentary papers were proved on the 24th of November, 1864, by *Ann Pettinger* and *Caroline Wightman*.

The bill in *Pettinger* v. *Ambler* was filed in May, 1865, by *Ann Pettinger*, praying for the execution of the trusts of the four testamentary papers and the settlement, and for the administration of the testator's real and personal estate.

The bill in *Bunn* v. *Pettinger* was filed in July, 1865, by *Elizabeth Bunn*, praying for (amongst other things) a declaration that the will of the 3rd of August, 1858, and the codicils of the 8th and 9th of July, 1862, did not operate as an exercise of the power of appointment reserved to *John Bunn* by the settlement of the 16th of August, 1862, and that such power was not exercised, save so far as it was exercised by the will of the 6th of November, 1862.

The two suits now came on together upon motion for decree.

In addition to the principal question as to the execution of the power in the settlement, there were other questions raised by the pleadings, and argued, which it is unnecessary to state for the purpose of this report.

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Mr. *Selwyn*, Q.C., and Mr. *B. Hardy*, for Mrs. *Pettinger;* and Mr. *Baggallay*, Q.C., Mr. *Renshaw*, Mr. *Rowcliffe*, Mr. *Luck*, and Mr. *Bardswell*, for different specific and residuary devisees and legatees under the will of 1858:—

Under the 24th and 27th sections of the *Wills Act* the will of 1858, speaking from the testator's death, operates as an execution of the power given to the testator by the settlement subsequently executed: *Stillman* v. *Weedon* (1); *Thomas* v. *Jones* (2); *Cofield* v. *Pollard* (3), unless a contrary intention appears by the will; but in this will there is no contrary intention, the testator having specifically devised part of the property to which the power extends, and having in the residuary devise expressly exercised all powers which he should have at his death. Nor does a contrary intention appear by the subsequent instrument of November, 1862; the appointment by that instrument of an annuity out of the property is not inconsistent with an appointment of the property itself, subject, of course, to the annuity, by the earlier will. That the will of 1858 is not revoked by the will of 1862 the grant of probate is conclusive. The words "this is my last will" have not the effect of revoking an earlier will: *Cutto* v. *Gilbert* (4), overruling *Plenty* v. *West* (5); *Freeman* v. *Freeman* (6); *Ford* v. *De Pontès* (7); *Williams* on Executors (8); the testator, if he intended to revoke the former will and codicils, would have revoked them expressly as he did by the will of 1858; if he had revoked them, he would have died intestate as to freehold and personal property acquired after the date of the settlement.

Mr. *Jessel*, Q.C., and Mr. *Swanston*, for *Elizabeth Bunn*:—

Upon a comparison of all the instruments, it is clear that the testator did not intend the will of 1858 to operate as an execution of the power. The nature of the specific devises in that will is inconsistent with the notion that they were intended to operate upon a reversion after the life estate of *Mrs. Bunn* charged with an annuity, which must be raised by sale. The use of the words "last will" in the power, and of the same words in the will of

(1) 16 Sim. 26.
(2) 2 J. & H. 475; 1 D. J. & S. 63.
(3) 3 Jur. (N. S.) 1203.
(4) 9 Moo. P. C. 131.
(5) 1 Rob. Ecc. 264.
(6) 5 D. M. & G. 704.
(7) 30 Beav. 572.
(8) P. 143.

2 Jur. N.S. 823.

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1862, the express exercise of the power by that will, the devise of the copyholds, which were the only property comprised in the will of 1858 and not comprised in the settlement, the appointment of different executors, and the absence of a confirmatory clause similar to that which was inserted in the codicils, all indicate that the will of 1858 was either revoked, or at all events was not intended to operate as an execution of the power. The grant of probate in common form is not conclusive against the revocatory effect of the will of 1862, and in respect of real estate and the execution of powers is wholly immaterial: *Barnes* v. *Vincent* (1). They also cited *Plenty* v. *West* (2); *Stoddart* v. *Grant* (3); *Farrar* v. *Earl of Winterton* (4); *Gale* v. *Gale* (5).

Mr. *Joshua Williams*, Q.C., for *Caroline Wightman*.

Mr. *Selwyn*, in reply.

Feb. 13. LORD ROMILLY, M.R.:—

The principal question in these suits is, whether the will of the testator which bears date the 3rd of August, 1858, is a due execution of the power contained in the settlement of the 16th day of August, 1862, under the *Wills Act*, or whether a contrary intention appears by the will.

The testator made his will on the 3rd of August, 1858, and by it he gave considerable legacies, and also made devises of his freehold and copyhold estate, which I do not think it is necessary to go through in detail; he professed to exercise all the powers which were or should be vested in him, and he revoked all wills and codicils theretofore made by him, and declared that to be his last will and testament. In July, 1862, he made two codicils to his will. On the 16th of August, 1862, he made a settlement of his property, which was to this effect: [His Lordship read the material parts of the settlement.] This settlement in fact disposes of the whole of the property which he then had, which had been comprised in his former will, with the exception of the copyholds.

After this, in the following month of November, he made a will,

(1) 5 Moo. P. C. 201. (2) 1 Rob. Ecc. 264. (3) 1 Macq. 163, 171.
(4) 5 Beav. 1. (5) 21 Beav. 349.

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which was in these words: [His Lordship read the will of November, 1862.] The testator died in the month of July following, and both wills and both codicils have been admitted to probate, and the question is, whether the former of these wills, which bears date the 3rd of August, 1858, is an execution of the power contained in the settlement.

There are two clauses in the *Wills Act* which in one sense may refer to this question—the 24th, which says a will shall be construed to operate from the death of the testator, and the 27th, which says that a general gift shall include all estates which a testator has a general power to appoint, unless a contrary intention shall appear by the will.

Now it is to be observed that the fact of the settlement disposing of the whole of the property comprised in the first will, except the copyholds, which are disposed of by the last will, does not prevent the operation of the first will, because both wills have been admitted to probate, and it is a question of construction.

I think I must look at the settlement and the testamentary instruments together to understand the matter properly. I find two wills, one in August, 1858, and another in November, 1862, and I find the settlement, which says the freeholds shall go in a particular manner, unless otherwise appointed *by his last will.* If both these wills had purported to deal with the property, and had appointed it by several and inconsistent devises, the latest in date would have governed the disposition of the property. After considering the matter in every aspect, I think the fact of making a second will after the date of the settlement, and calling that his last will, is evidence that the testator did not intend his first will to operate as an execution of the power contained in the settlement. If a man leaves several wills, all of which are intended to operate more or less on his property, though each one is called his last will (as no doubt it was when it was executed), still each former will ceases to be the last will when another is executed; and this is so, although the former wills are still operative, and though they are all proved and speak from the death of the testator. The testator may obviously distinguish between the first and second and last will, as he might between the first, second and last codicil, and yet all may speak from the death of the testator, and the only ques-

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tion, in my opinion, is whether this testator has intended to make such a distinction.

Suppose this case, that a testator settled property upon *A.* for life, with remainder to *B.*, and afterwards, after reciting that he had made three wills with respect to various portions of his property, the settlement directed that the property, the subject of the settlement, should, after the death of *B.*, go according to the directions contained in the first will, or according to the directions contained in the second will, or according to the directions contained in the last will; no one, I think, could doubt that this would operate as a settlement according to the directions contained in that one of the three wills which he so designated in order of date. Suppose the settlement, after reciting that he had made a will, directed that the property settled should go according to the directions contained in the last will, I think the same effect would be produced; and I think it would be the same thing, if the settlement directed how the property should go, if he did not otherwise direct in that one of his wills which should be the last of the wills he should leave.

These are, in my opinion, only different modes of doing the same thing, that is, distinguishing between the wills he leaves; and the real question, I think, is what is done here. By the settlement he directs that, after the death of Mrs. *Bunn,* the property shall go as he shall appoint by his last will, and in default of such appointment he gives it to her absolutely. Three months after he makes a will which he calls his last will—it is, in fact, his last will, though there is another will of his called a last will, but prior in date, which is still unrevoked. By this, which is the last will in fact, so far as the date of execution is concerned, he devises the copyholds and makes an appointment of an annuity out of the freeholds, but no other appointment of the freeholds. In this state of circumstances I think the former will cannot be brought in to operate as an execution of the power contained in the settlement of August, 1862. It is clear, I think, that when a man has made a will, not intending to make another, and settles property so as to go in a particular manner, unless altered by his last will, or the last of his wills, any person not versed in the technical matters of legal language and fictions would understand

him to mean the latest will in date, if he has two wills. He does not say, as appointed "by my will" generally, but "by my last will." Supposing he had said "by my first will," would not that be designating the will of 1858? He might have made as many wills afterwards as he thought fit, to vary from time to time the disposition of his property, merely intending that the last will should be the one to govern the exercise of the power. It is true that a testator does not often make more wills than one, intending each to have an operation, though he frequently makes many codicils. Would there have been any difficulty here if he had said "the last codicil" instead of "the last will?" If I adopted the other view, I should be deciding that the words "last will" meant "a will I have made," or "either of the wills I have made," and that, although the settlement is a conveyance of everything contained in the first will with the exception of the copyholds. It is also to be observed that there might have been a very good reason operating in the testator's mind for not revoking by his will of 1862 that of August, 1858, for if he had acquired any freehold property after the date of the settlement it would have passed by the first will and not by the second.

I am, therefore, of opinion that the will of August, 1858, and the codicils of July, 1862, did not operate as an execution of the power contained in the settlement of 1862; but it must be understood that, if the testator had not made a will after the settlement, I should have held that the first will was an execution of the power.

Feb. 20. The case having been mentioned again upon the minutes, His Lordship observed that he had intended in his judgment to refer to the case of *Harwood* v. *Goodright* (1).

Solicitors for the Plaintiff in the first suit: Messrs. *Parker, Rooke, & Parker.*

Solicitors for the Plaintiff in the second suit: Mr. *Waugh.*

Solicitors for the Defendants: Messrs. *Walters & Gush*; Messrs. *Gregory & Co.*; Messrs. *Chilton, Burton, & Co.*

(1) Cowp. 87.

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Jan. 20, 22, 24.

AINSWORTH v. WALMSLEY.

Injunction—Trade mark—Name of Manufacturer—Use of Particular Numbers—Misrepresentation—Scienter.

The Plaintiff being a thread manufacturer of repute, the Defendant bought in the market thread, wound on spools, not made by the Plaintiff, of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of the Plaintiff thread in the hank for the purpose of winding, and selling it when wound. Defendant sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of the Plaintiff's make, and invoiced them to the customer under the description of certain numbers, which the Plaintiff had adopted and exclusively used in order to designate his particular manufacture. The customer attached the Plaintiff's name and numbers to the spools of thread, and retailed it to the public as of the Plaintiff's make :—

Held, that there was not such a degree of wilful misrepresentation on the part of the Defendant as would justify the Court in granting an injunction, and bill dismissed, but without costs.

The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade-mark.

THIS bill was filed by *Thomas Ainsworth* for an injunction against *James Walmsley* and *Gerard Pitman*, to restrain them "from selling, or exposing for sale, or procuring to be sold as thread manufactured by the Plaintiff, any thread not manufactured by him," and for damages and an account.

The Plaintiff was a manufacturer of sewing thread at *Cleator Mills, Cumberland;* and his course of business was to sell thread to wholesale dealers. He usually sold his goods with labels attached to each end of the spool on which the thread was wound, and packed in boxes, the labels and boxes bearing his name. In each of the boxes of 3-cord thread was attached a fly-leaf, on which was printed as follows: "*Ainsworth's* Machine Linen Thread is manufactured expressly to meet the requirements of sewing-machines, to which end it is all 3-cord." Then followed a series of numbers 15, 18, 21, &c., underneath which was another series, 10, 12, 14, distinguished as "*Ainsworth's* numbers," and under-

neath again a third series, 47, 56, 65, &c., described as "numbers of yards per half-ounce;" so that the degree of fineness of all thread marked with the same number of *Ainsworth*, whether of two-cord or three-cord, was the same.

The case made by the bill was, that on or about the 24th of September, 1862, *John Harris*, a traveller of the Defendants' (who were lace and trimming manufacturers in the city of *London*) offered for sale to Mrs. *Fell*, a retail mercer, at a price about £15 per cent. cheaper than that of the Plaintiff, a quantity of three-cord thread, which she declined to buy unless it was of the Plaintiff's make. *Harris* then left, but subsequently, having received the Defendant *Walmsley's* instructions, returned, and assured Mrs. *Fell* that the thread was manufactured by the Plaintiff. Mrs. *Fell* thereupon bought upwards of 4500 spools of thread, which was invoiced to her by the Defendants, by numbers the same as those in use by the Plaintiff, and she afterwards sold the thread as the Plaintiff's thread of the numbers at which it was so invoiced. She also procured a lithographer to lithograph for her labels in close imitation of the Plaintiff's labels, and bearing the numbers at which the thread had been invoiced to her, and she affixed these labels to one end of the spools, which she then placed, with the labels, in old boxes of the Plaintiff's. The thread so sold by the Defendants to Mrs. *Fell* was not manufactured by the Plaintiff, and was of inferior quality.

In November, 1864, this sale of spurious thread was first discovered, and in that month Mr. *Neill*, the Plaintiff's agent, purchased some of this thread from Mrs. *Fell*.

The original bill was filed on the 5th of February, 1865, and it alleged that the Defendants at the time of their selling the thread and instructing *Harris*, as above-mentioned, well knew that the thread was not of the Plaintiff's manufacture, and was of very inferior quality and value to his.

The Defendants' case was, that in September, 1862, they purchased from a firm of *Harris & Saunders* a quantity of thread which had been, as they were informed and led to believe by them, a part of the stock of a late firm of *John Wreford & Co.*, wholesale haberdashers, whose stock had been sold off as a job lot. These spools had a label with "*John Wreford & Co.*" upon them,

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and the Defendants were then told by *Harris* and *Saunders* that the thread was of the Plaintiff's manufacture. Some of these spools they took to *Neill*, the Plaintiff's agent, who would not either admit or deny that they were of the Plaintiff's manufacture. Believing them to be manufactured by the Plaintiff, Defendants afterwards sold a large portion of them to Mrs. *Fell*, in the manner above-mentioned, and used the rest in their own business.

The injunction was moved for on the 2nd of March, and on the 9th was ordered to stand to the hearing.

The following evidence, subsequently filed, was referred to and commented on in the argument and at the hearing :—

Neill, the Plaintiff's agent, deposed that at the interview in September, 1862, the Defendant *Walmsley* brought some unwound thread, which he shewed to the deponent, and said, "I have some thread offered to me for sale, and want to know if it be yours." Deponent replied, "If it be ours, it will bear our name and label. We own no thread unless it bears our name and label." Defendant then said, "This is some of *Wreford's:* did you not make for them?" Deponent replied, "We did, and so did other parties; but if you think of purchasing any of that, be careful, as I am informed that *Wreford* themselves admit that the thread they purchased from us has been doctored." Defendant then left.

The Defendant *Walmsley*, in answer, denied the truth of the above representation of the conversation, adhering to his former statement, and adding that the result of that and a subsequent conversation was to lead him to believe that the thread was of the Plaintiff's manufacture, which had been supplied by the Plaintiff to *Wreford & Co.* in the hank or skein. When he instructed *Harris* to sell, he did not instruct him to sell by numbers, nor did *Harris* so sell, but the numbers were introduced into the invoice of the goods sold to Mrs. *Fell* "solely with reference to" the above conversation.

Robert Minton, late a partner in the firm of *Wreford & Co.*, a witness on behalf of the Defendants, deposed that the firm were winders, not manufacturers of thread; and were in the habit of buying thread in the hank or skein in large quantities from the Plaintiff; and that the thread wound by them was principally of the Plaintiff's manufacture. The spools on which the thread was

so wound by them were labelled "*John Wreford & Co.*," the fineness of the thread being indicated, not by numbers, but by letters.

The Plaintiff, in cross-examination on his affidavit, deposed that he never objected to *Wreford's* spooling his thread; and it was quite indifferent to him under what name it was sold, provided it was sold without his name. He never manufactured more than one quality of three-cord thread.

The *Attorney-General* (Sir *R. Palmer*), and Mr. *Fry*, for the Plaintiff:—

The relief sought is on the ground of the misrepresentation by the Defendants that the thread sold by them was thread of the Plaintiff's manufacture; such misrepresentation having been conveyed to Mrs. *Fell* by the invoice, and by express statement, and through her to other customers by the unauthorized use of the Plaintiff's name and numbers. Thus far the Defendants' case is virtually undefended.

The principles upon which the Court acts in cases of misrepresentation where the party making it has not sufficiently informed himself as to the truth, are laid down in *Higgins* v. *Samels* (1).

Mr. *Rolt*, Q.C., and Mr. *Bagshawe*, for the Defendants:—

This is not a case of trade-mark, and the difference between cases of trade-mark and of misrepresentation is, that in the former it is not necessary to prove the *scienter*: *Hall* v. *Barrows* (2); *Pasley* v. *Freeman* (3): whereas if misrepresentation is alleged, it must be strictly proved that it was wilful. In the latter case the relief does not rest, as in the former, upon the ground of property.

Not only is the wilful nature of the misrepresentation not proved, but it is not established that the sale of *Wreford's* thread was any injury to *Ainsworth*. The fact of the inferiority of *Wreford's* thread is not proved, and if what was sold was really not inferior, the further publication of *Ainsworth's* name was an advantage to the Plaintiff. There is no instance of the Court interfering to prevent *B.* from putting *A.'s* name on goods manufactured by *B.* if *A.* sustains no injury thereby.

(1) 2 J. & H. 460.

(2) 33 L. J. (Ch.) 204; 10 Jur. (N. S.) 55.

(3) 2 Sm. L. C. 62.

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The arrangement of numbers in this case was neither a trade-mark nor a name; any one is at liberty to use numbers, whether with the Plaintiff's license or not.

If the case amounts merely to mistake on part of the Defendants in selling goods as the Plaintiff's, which they honestly but erroneously believed to be his, it is not a case for an injunction.

Even if the evidence should appear to the Court to fail in shewing that the error was innocent, the Court will not go the length of granting an injunction, where there has been no assumption of a trade-mark or a name, but only the use of particular numbers.

The burden of proof lies upon the Plaintiff to shew that the particular bundle of goods sold to Mrs. *Fell* was spurious.

They cited *Higgins* v. *Samels* (1); *Millington* v. *Fox* (2); *Hall* v. *Barrows* (3); *Welch* v. *Knott* (4); *M'Andrew* v. *Bassett* (5); *Haycraft* v. *Creasy* (6); *Polhill* v. *Walter* (7); *Langridge* v. *Levy* (8); *Rawlings* v. *Bell* (9); *Collins* v. *Evans* (10); *Barley* v. *Walford* (11); *Jennings* v. *Broughton* (12); *Taylor* v. *Ashton* (13); *Evans* v. *Edmonds* (14); *Moet* v. *Couston* (15).

The *Attorney-General*, in reply:—

The Defendants' proposition is that one trader, buying goods as being the manufacture of another, and not knowing and not having the means of knowing whether they are his or not, is at liberty to put the particular marks of the manufacturer upon them, and sell them, without his license.

But this would not be permitted in the case of a trade-mark; and there is no difference in principle between a trade-mark and the use of numbers. The rights of property in trade-marks, referred to by Lord *Westbury* in *Hall* v. *Barrows*, do not arise *à priori*, as in land or chattels, but have gradually sprung up with

(1) 2 J. & H. 460.
(2) 3 My. & Cr. 338.
(3) 33 L. J. (Ch.) 204; 10 Jur. (N. S.) 55.
(4) 4 K. & J. 747.
(5) 33 L. J. (Ch.) 561; 10 Jur. (N. S.) 550.
(6) 2 East, 92.
(7) 3 B. & Ad. 114.
(8) 2 M. & W. 519; 6 L. J. (N. S.) (Ex.) 137.
(9) 1 C. B. 951.
(10) 5 Q. B. 820, 826.
(11) 9 Q. B. 197.
(12) 5 D. M. & G. 126.
(13) 11 M. & W. 401.
(14) 13 C. B. 777.
(15) 33 Beav. 578.

the growth of trade: *Croft* v. *Day* (1); *The Emperor of Austria* v. *Day* (2).

As to the *scienter*, what does want of knowledge amount to? The Defendant *Walmsley* makes a statement, and, taking it even that he did not know that the statement was false, he is liable for the misrepresentation, if it turns out to be false: *Evans* v. *Edmonds* (3); *Millington* v. *Fox* (4).

Wreford's mark was on the reels; then what excuse could the Defendant have for invoicing them as *Ainsworth's*? *Burgess* v. *Hills* (5); *Edelsten* v. *Edelsten* (6).

Mr. *Bagshawe* replied upon the cases cited in reply.

SIR W. PAGE WOOD, V.C.:—

This is a case of singular character, presenting, on the one hand, circumstances not at all creditable to the Defendants, but, on the other hand, involved in very considerable difficulties arising from the acts of the Plaintiff. That the Plaintiff has been very grievously wronged throughout the whole of the transactions, including the conduct of Mrs. *Fell*, there can be no question.

The Plaintiff is a manufacturer of thread of admitted reputation. I say "admitted," because the Defendants themselves, who, having bought the thread through the hands of another person, and knowing it came from a firm named *Wreford*, of whose stock it constituted part, were anxious to buy the thread as *Ainsworth's*, make it part of their own case that it was sold to them, with the knowledge of the sellers, as *Ainsworth's* thread; and that it was so represented before it was bought by them. The Defendants, therefore, must have set value on the name of *Ainsworth* before they bought the thread.

The Plaintiff alleges that, besides this grievance, others of a like nature were brought to his attention; but whether that is so or not is not very material. His agent in *London* found that Mrs. *Fell*, a dealer in articles of this description, was selling thread, not his, with his spools, or spools counterfeiting his, bearing his name on them at the top, though not at the bottom. The coun-

(1) 7 Beav. 84.
(2) 3 D. F. & J. 217.
(3) 13 C. B. 777.
(4) 3 My. & Cr. 338.
(5) 26 Beav. 244.
(6) 1 D. J. & S. 185.

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terfeit, therefore, was not complete; but Mrs. *Fell* sold the thread in boxes like the Plaintiff's, with his name, and with those particular numbers with which he marks his thread. The thread sold by Mrs. *Fell* was undoubtedly spurious. I say undoubtedly, because it is proved that she has been obliged to offer it at half the price of *Ainsworth's*, and, even at that reduced price, has not been able to dispose of it.

The Plaintiff, therefore, has suffered an injury of a most serious character, not only by a large quantity of goods having been sold, to the profit of which he was entitled, but by a large quantity of spurious thread bearing his name having been thrown upon the market, to the injury of his credit with his customers.

Moreover, Mrs. *Fell* herself fell, to some extent innocently, into the mistake. I do not think she was justified in placing on the spools the name of *Ainsworth*. But she did it in this sense innocently, that she was assured, by the agent of the Defendant *Walmsley*, and, by the invoices, that the thread was *Ainsworth's*.

The case has been extremely well argued on both sides; but some points have been asserted on behalf of the Defendants which I cannot pass without notice.

First, it was contended, though not very strenuously, that the case was not one of trade-mark at all—that there had simply been a representation that the thread was *Ainsworth's;* and it was argued, on the authority of *Millington* v. *Fox* (1) (which was referred to by Lord *Westbury* in *Hall* v. *Barrows*) (2), that whereas a trade-mark is property, the use of a man's name is a simple misrepresentation of a definite description, which requires the *scienter* in order to constitute a fraud in respect of which this Court will give relief.

But taking the doctrine as Lord *Westbury* stated it, there can be no difficulty or mystery about the matter. This Court has taken upon itself to protect a man in the use of a certain trade-mark as applied to a particular description of article. He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen,

(1) 3 My. & Cr. 338. (2) 33 L. J. (Ch.) 204; 10 Jur. (N. S.) 55.

another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the Court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark. And inasmuch as the Court protects the owner of the mark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which, being protected by this Court, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property.

The same may be said of a singer's voice. A singer may dispose of his voice by contract to one person, and the Court will prevent his disposing of that voice to another. The voice is in that sense property.

Then, is not a man's name as strong an instance of trade-mark as can be suggested? subject only to this inconvenience, that if a Mr. *Jones* or a Mr. *Brown* relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name. But there is no evidence before me that any other person than the Plaintiff has ever been heard of as manufacturing *Ainsworth's* thread; and therefore "*Ainsworth's* Thread" is as good a mark as "Anchor Thread," "Lion Thread," or any other which may be described by a particular name.

The use, therefore, of the name of another manufacturer, whether done *scienter* or not, is an interference with his business which this Court will interpose to prevent, on the ground that the Defendant is endeavouring to pass off the goods of his own, or somebody else's manufacture, as the manufacture of the Plaintiff.

In the case of *Dent* v. *Turpin* (1), I interfered solely on the ground that the Defendant was using the name of *Dent* in the trade of a clockmaker, having no right to use that name; and in that case there was a difficulty arising from the circumstance that Mr. *Dent* had left his business to his two sons. That case has not, that I am aware, been made the subject of appeal. I also interfered in a similar case of a shop in *Regent Street*.

The case of the *Hungarian* notes, *The Emperor of Austria* v.

(1) 2 J. & H. 139.

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Day, I do not consider to be exactly in point, because a bank note has the appearance of Government money; and it has, therefore, the double *indicium*, the appearance of the note, as well as the name thereon appearing.

The next point I have to consider is how far, under the particular circumstances of this case, the Defendants are answerable for the use of the Plaintiff's name.

There is this circumstance in the case, that the Defendants bought this thread of *Wreford*, wound by *Wreford*, and with *Wreford's* name on the spools, and then sent it into the market in that very state by means of an agent. The purchaser declines to purchase unless she is assured the thread is *Ainsworth's*, whereupon the agent goes back, and returns and tells her, "This is *Ainsworth's* thread, and you may buy it as such." Taking the case most strongly against the Defendants, it merely amounts to this, that *Walmsley* stated to the purchaser, "I sell you thread which I have bought of *Wreford*, but which I know to be *Ainsworth's*." He tells her that she has not the security of the thread being *Ainsworth's* beyond his word that he got it of *Wreford*, and therefore knows it to be *Ainsworth's*.

I think clearly that is not a case of the assumption of a trademark which would justify the interference of the Court; and for this reason, that if Mrs. *Fell* had made the same representation to purchasers in the market, they would have had only their own folly to complain of, if they had trusted to the assertion. No doubt it was a most unjustifiable representation, but it was nothing more.

This has been the real difficulty of the case. I do not for one moment agree with the argument urged by the Defendants' counsel, that it would have been lawful for the Defendants to have sold this thread in skeins to Mrs. *Fell*, saying it was *Ainsworth's* thread. That would have been a distinct misrepresentation, which would have given them an advantage they would have had no right to derive.

But in this case the statement disclosed the circumstance, which was never concealed, that the article had passed through the hands of another manufacturer. That statement rested in some degree on belief, which might have led to guarantee. Mrs. *Fell*, or any other

customer, might have had a right of action on the guarantee, but every customer would know it had passed through a second hand, and was open to the suspicion of having been doctored.

If the Defendants had bought the thread from *Wreford*, unreeled it, and skeined it for the purpose of selling it as *Ainsworth's*, that would have been a case of fraud, which I am not called upon to consider here.

The only remaining point is the question of the numbers, which appears to me to be the most unjustifiable part of the Defendants' case. That act, which is what constituted the real injury to the Plaintiff, namely, the substitution of the labels—was wholly unjustifiable; but still, when strictly analyzed, considering that the spools bore the name not of *Ainsworth* but of *Wreford*, it resolves itself into a mere question of belief, as distinguished from positive and direct knowledge. The article was purchased with the name of *Wreford* upon it, and the guarantee of the original manufacturer, whether consisting of trade-mark or name, or whatever the *indicium* might be, was not obtained. The first purchaser, Mrs. *Fell*, or any other purchaser buying from her, and changing the name, would have been bound to account for the circumstances which had caused *Wreford's* name, instead of *Ainsworth's*, to appear on the goods.

On the question of costs, though I must hold that there has not been that clear and distinct representation given to the world by the Defendants of the goods being the goods of the Plaintiff which would justify the Court in interfering, yet the conduct of the Defendants in putting these numbers in the invoices was such as to justify the Plaintiff in having a complete investigation of the whole case; and the bill must be dismissed without costs.

Solicitor for the Plaintiff: Mr. *W. Warwick King.*

Solicitors for the Defendants: Messrs. *Van Sandau, Cumming, & Sons.*

V.-C. W.

1866

Feb. 12, 13, 14.

TATE *v.* WILLIAMSON.

Vendor and Purchaser—Fiduciary Relation—Concealment—Undervalue—Setting aside Purchase.

A., a nephew of a former trustee of *B.*'s property, being commissioned by his uncle to advise *B.*, a young man, aged twenty-three, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to £1000, and to advance him £500 for the purpose, offered to give him £7000 for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years. Pending the negotiations, *A.* obtained from *C.*, a mining engineer, an estimate putting the value of the minerals under the entire estate at £20,000. A separate solicitor was employed for *B.* *A.* did not communicate the valuation to *B.*, nor did he suggest to him that he should consult a mineral surveyor before concluding the matter. *B.* accepted *A.*'s offer of £7000, and died shortly after executing the conveyance. On bill by *B.*'s administrator to set aside the purchase:—

Held, that such a fiduciary relation existed that the suppression from *B.* of *C.*'s valuation rendered it impossible for the Court to sustain *A.*'s purchase.

THIS was a suit for the purpose of setting aside the purchase by the Defendant, *Robert Williamson*, of an estate in *Staffordshire*, from a young man since deceased, on the ground of fiduciary relationship between vendor and purchaser, gross undervalue, ignorance and inexperience on the part of the vendor, and concealment from him of a valuation of the property obtained by the purchaser during the negotiation. The bill was filed by the father of the young man as his heir-at-law and next of kin, under the following circumstances:—

By a settlement made in 1778, and certain subsequent deeds and wills, the *Whitfield* estate, which comprises 215 acres in the coal district of *Staffordshire*, became vested in *H. H. Williamson*, *R. E. Payne*, and *J. Rothwell*, upon trusts, for working the mines under the same, and paying the rents in equal moieties to *Ann* and *Eliza Harrison*, the corpus of each moiety being given in remainder to the children of *Ann* and *Eliza Harrison* according to their appointment.

Eliza Harrison, who was married to the Plaintiff, *William James Tate*, died in October, 1837, leaving one child, *William Clowes Tate*,

to whom she had, by deed of appointment, executed shortly before her death, appointed her moiety of the *Whitfield* estate absolutely.

In 1844 the coal workings, which had been carried on by the trustees, and principally by *H. H. Williamson*, who was an owner of coal mines in the neighbourhood, and a connection of the family by marriage, his wife being the half-sister of *Eliza Harrison's* mother, were discontinued from the absence of profit, and the colliery plant was sold. After the death of his wife in 1837 the Plaintiff had married again, and out of the rents of his son's moiety, amounting to about £225 per annum, he was allowed £100 per annum for his son's maintenance and education, this amount being increased to £200 per annum when the young man went to *Oxford*. On the 5th of July, 1857, *William Clowes Tate*, who was then an undergraduate at *Exeter* College, *Oxford*, attained twenty-one. Accounts of the receipts and expenditure during his minority were laid before him, and his moiety of the estate was conveyed to him by the trustees. *William Clowes Tate* appears to have been a young man of extravagant and intemperate habits; he was unable to take his degree at the proper time, and on coming of age he was so heavily indebted to *Oxford* tradesmen that he was shortly afterwards compelled to raise £1000 on mortgage of his property.

He had been induced by his father, soon after he came of age, to purchase a house of the father for £4500. He re-sold this house in January, 1859, for £3400; and partly on this account, and partly from his extravagance and idleness, &c., the father and son became estranged to such a degree that the father would not even open letters from his son, and saw him for the last time eighteen months before his death. *H. H. Williamson*, who was still the acting trustee of the other moiety of the *Whitfield* estate, continued to receive the rents of the entire property after *W. C. Tate* had attained twenty-one, and until the autumn of 1858, when from bad health he was obliged to leave home, having commissioned his nephew, *Robert Williamson*, as his clerk and assistant, to collect the next half-year's rents. In July, 1859, *William Clowes Tate*, who was then staying at *Plymouth*, nominally reading for his degree, was much pressed by his *Oxford* creditors. In his difficulties, being at the time too much estranged from his

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father to apply to him for assistance, he wrote to his great-uncle, *H. H. Williamson*, who had always been on very kind and friendly terms with him, and had in July, 1857, made him a present of £500 towards payment of his debts. On getting *William C. Tate's* letter, *H. H. Williamson* at once sent him £50, and invited him to come to him, and make a full statement of his liabilities. *William C. Tate* did not comply with this request, but sent a list of debts, drawn up by a Mr. *Holloway*, of *Oxford*, amounting to £1000. *H. H. Williamson* handed over the list to his nephew, the Defendant *Robert Williamson*, who remarked that the charges were excessive, and that the bills might probably be settled for half the amount. *H. H. Williamson* then requested his nephew to see *Tate*, and ascertain on what terms he could be relieved from his debts, authorizing him to advance £500 for the purpose, or a little more if necessary, on further security of the property. *R. Williamson* thereupon wrote to *W. C. Tate*, proposing to meet him in *London* to talk over the matter, and see how it could be arranged. *Tate* consented to meet *R. Williamson*, and came up from *Plymouth* for the purpose. The account of the interview, which took place at *Ridler's* Hotel, *Holborn*, on the 5th of September, 1859, as given by *R. Williamson* in his answer, was that he offered to negotiate with *Tate's* creditors for an abatement of their claims, stating that he was authorized by his uncle to advance £500, or more if required. *Tate*, however, positively refused to ask for any reduction, or even to allow it to be asked for, "as any such application would injure his character," but added that he was desirous of selling his share of the *Whitfield* estate, and had been already offered £6000 for it. The Defendant, who "had previously some idea of endeavouring to become the purchaser of the estate in case it should come into the market," told *Tate* that if he was really going to sell his moiety it was not unlikely that he (Defendant) might become the purchaser, if they could agree as to price. *Tate* then asked either £7500 or £8000, and after some conversation Defendant said he would be willing to go as high as £7000, on condition that he might pay by instalments. *Tate* promised to give him an answer next morning, and accordingly called next day, and told Defendant that he was willing to accept the offer of £7000, payable by instalments, requesting that the agreement might be at once drawn

up and signed. The Defendant was, as he said, unwilling to conclude the matter in such a hurried way, and pressed upon *Tate* the necessity of consulting his father before concluding the bargain. *Tate* positively refused, and was urgent that the agreement should be drawn up there and then. They accordingly went to Messrs. *Clowes & Hickley*, in the *Temple* (the *London* agents of Defendant's solicitors). Neither of the partners was at the office, but Mr. *Wedlake*, the managing clerk, whom they saw, refused to draw up any agreement until some independent solicitor had been instructed by *Tate*, and advised him, as *Robert Williamson* had, to consult his father before doing anything further. *Tate* being firm on this point, it was then suggested by the Defendant that he should consult Mr. *Payne*, one of his late trustees and a solicitor. This was agreed to by *Tate*, and £100 was advanced to him by the Defendant to meet pressing claims. Four days later the Defendant wrote from *Staffordshire* to *Tate*, again urging him to consult his father and his friends before finally disposing of his share of the property. This letter, which was dated the 10th of September, 1859, contained the following passages:—"I will give you plenty of time to consult them (your friends), and if you find you can sell *Whitfield* for more than I offer you, I will at once make the agreement null and void; but, as I have told you, if I buy it I shall do so as an investment for my little children, and not look at it as buying it to open a colliery. At the present time, indeed, the market is glutted with coals, and will be more so when Mr. *Heath*, who I named, and my brothers, open their extensive works; and again, I have no great liking towards buying divided property. It is not like buying the full share, and oftentimes do purchasers of such property meet with trouble and plague from the other parties who are interested in it. *Whitfield* is also without either roads to railway or canal, and the parties who join being mine-owners themselves, are not very likely to allow one over their land without a very heavy charge, if at all. However, I must again repeat that if you find after you have consulted your friends that you can do better with it, then I will consider our agreement at an end, but you must please let me hear from you before the end of the month, as I shall have to borrow the money from my father-in-law or my uncle to pay for it."

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The Defendant, after making his offer of £7000 on the 5th of September, had obtained a valuation of the property from a Mr. *Cope*, a mining engineer. This valuation, which was received by the Defendant "on or about the 10th of September," but had been "long since lost or destroyed," was stated by the Defendant to have been to the following effect:—

"*Whitfield Estate.* I estimate the mines under the estate at £20,000."

In reference to this circumstance, the Defendant stated in his answer that such estimate was, as he believed, made upon the assumption that the mines under the *Whitfield* estate would be worked jointly with the mines under an adjoining estate having access to a railway; that he considered such estimate, in any event, extravagant; and, unless on such assumption, wholly without foundation; that the only value he had placed on the moiety of the surface was about £5000, and that he had never set any value upon the mines, as it was not possible to do so until the circumstances under which they could be worked were ascertained.

The parties again met in *London* on the 14th of September, and a further advance of £100 was made by *R. Williamson*, but *Tate* delayed consulting Mr. *Payne* until the beginning of October. Mr. *Payne*'s account of the matter was, that when told of the proposed sale he knew little or nothing as to the value of the *Whitfield* estate beyond that the surface rental of the whole was about £400 per annum, and that the estate possessed coal mines which had been found capable of being worked. He thought and said at the time that £7000 was below the value, as the other moiety was, in his opinion, worth £8000; but he did not feel called upon to interfere with the progress of the bargain, feeling certain that if it fell through *Tate* would have got into the hands of the money-jobbers, and parted with his property at a greater sacrifice, and that if a sacrifice must be made, it was better to make it in favour of *R. Williamson* than of an entire stranger. Accordingly the matter was allowed to proceed, and on the 5th of October an agreement, as settled by Mr. *Payne*, was signed by the parties for the sale to *R. Williamson* by *W. C. Tate* of his moiety of the *Whitfield* estate for £7000, which was made payable by instalments, of £1500 on signing the agreement, £2000 on the 25th of

March, 1860, and the remaining £3500 by four annual instalments.

The money paid by *Robert Williamson* on the footing of this agreement was advanced to him by *H. H. Williamson* as a gift.

The following letter from the vendor to his aunt was written from *Plymouth* on the 6th of November, 1859:—

"I have been very unwell for some time, or should have answered your letter before. In reply to your question, I have sold my whole interest in *Whitfield* to Mr. *R. Williamson* for £7000. I wrote to my uncle previously, but he was too unwell to attend to anything in the shape of business, so my letter was passed on to Mr. *R. W.*, who wrote to me, and requested me to meet him in *London*, which I did, and as I was greatly in want of money, and he offered me what I considered a fair bargain, I accepted his offer. I might possibly have got more for it, but I could not afford to wait; and, moreover, thought that you would prefer its remaining among the *Williamsons* to its going to a stranger. I did not mention it to you (though I feel that I ought to have done so), because as papa could not, or would not, assist me, I was obliged to shift for myself; and as it was a matter of urgent necessity, I must have done it whether you liked it or not, and as Mr. *Payne* did not seem to disapprove of it, I thought that the more quietly it was done the better. I am, however, very sorry, because it shews a want of feeling, which I assure you was not the case; in fact, if there were any other reason beyond that which I have just mentioned, it would be that I was ashamed to tell you: a false shame, I admit, but still none the less shame. Moreover, at that time I was so harassed and confused that I could hardly think of anything, and wonder now how I managed matters as well as I did."

In this same month of November, 1859, *W. C. Tate* had an attack of *delirium tremens*, from the effects of which he never recovered, and in May, 1860, he died intestate, and without having been married, in his lodgings at *Plymouth*.

The purchase by *Robert Williamson* was, very soon after *W. C. Tate's* death, questioned by his father, and in February, 1862, the present bill was filed by him as administrator and heir-at-law of his son, against the *Williamsons*, uncle and nephew, for the pur-

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pose of setting aside the sale of September, 1859. As ground for the relief sought, the following case was charged:—That the Defendants were at the time of the sale in a fiduciary position to *Tate*, in reference to the property sold, and that *Robert Williamson* had formed a scheme which was furthered by his uncle, *H. H. Williamson*, for purchasing the property in violation of their duty as his agents, and the confidence reposed in them by *Tate*; that the price paid was grossly inadequate; that no proper survey of the property was made at the time of the sale; and that while *Tate* from his youth, his reckless and improvident habits, the pressure by his creditors, and the absence of independent advice and assistance at the time, was incapable of forming a proper judgment in the matter, the Defendant *Robert Williamson*, having obtained a valuation of the property from *Cope*, procured, and the Defendant, *H. H. Williamson*, permitted *Tate* to execute the agreement in ignorance of such valuation, which was not communicated to him.

The bill, as originally framed, charged the Defendant, *H. H. Williamson*, with having a direct interest in the purchase, and evidence directed to this point was adduced. The answer of *H. H. Williamson* disclaimed any interest in the matter, although it was admitted that the purchase-money had been advanced to *Robert Williamson* by *H. H. Williamson* as a gift.

The evidence as to the value of the property was very conflicting, the Plaintiff's witnesses placing it as high as nearly £75,000 for the entirety, or £345 15*s.* per acre, while the Defendant's witnesses fixed the value of the entirety at £15,000, or £61 2*s.* 6*d.* per acre. This great discrepancy was in some measure reconciled, first, by the circumstance that the Plaintiff's valuers had assumed that the minerals had not been already to any extent worked; and, secondly, that a branch could be made to connect the estate with the *Biddulph* Railway, and that way-leaves over the lands of adjoining owners would be granted.

A great mass of evidence not necessary to be stated in detail was adduced on this and the other portions of the case.

Mr. *W. M. James*, Q.C., and Mr. *Little*, on behalf of the Plaintiff, contended that the purchase ought to be set aside on the following

grounds, which it was submitted were fully made out by the evidence:—

1. The purchase, whether made by *Robert Williamson* or by his uncle, *H. H. Williamson*, was made by a person standing in a fiduciary position to the vendor. *H. H. Williamson* having been the trustee, and being still the agent and confidential adviser of *Tate*, deputed his nephew, who acted for him in the collection of rents and the management of the trust property, to advise *Tate*, and get his difficulties arranged. Having received this commission, *Robert Williamson* was thereby placed in a fiduciary position towards *Tate*, and was at once precluded from making any bargain with him for the purchase of his property, until he had given him the fullest and fairest explanation of every fact relating to the property within his knowledge. 2. But even assuming that the fiduciary position did not exist, the purchase was at a gross undervalue, from a vendor reckless and improvident, incapacitated by drink, ignorant of business, and destitute of proper advice and assistance, and the Court would not allow the transaction to stand. 3. Independently of fiduciary relationship and undervalue, the contract had been brought about by misrepresentation, and there had been a suppression of such a material fact (the valuation obtained from Mr. *Cope* by the Defendant *Robert Williamson* during the negotiation), that the Defendants could not be allowed to retain their purchase: *Rossiter* v. *Walsh* (1); *Turner* v. *Harvey* (2); *Dart*, V. & P. (3).

Mr. *G. M. Giffard*, Q.C., and Mr. *Kay*, for the Defendant *H. H. Williamson*, submitted that, as the case alleged against him in the original bill had been virtually abandoned after he had put in his answer and disclaimer, and it was clear that he had nothing whatever to do with the transaction, he must be dismissed with his costs.

Mr. *Rolt*, Q.C., and Mr. *H. F. Bristowe*, for the Defendant *Robert Williamson*, contended that, having regard to the very speculative character of the property, and the wild sort of estimate that had been placed upon it by the Plaintiff's witnesses, the purchase was not at such an undervalue as to induce the Court on that ground

(1) 4 D. & War. 485. (2) Jac. 178. (3) P. 21, 22.

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to set it aside. At the time of entering into the contract *Tate* was in great difficulties. He was hard pressed by his creditors, his own father had cast him off, and the only course open to him in order to escape from his difficulties, was a sale of his property. Was he to be deprived of the right enjoyed by every owner of property of doing what he would with his own? There was no haste or pressure upon him that he should conclude the matter. He was urged again and again to consult his father, or at least to take independent advice. He thoroughly understood the nature of the transaction, and after the evidence afforded by his own letters, it was idle to allege, as was alleged in support of the bill, that he was incapacitated by drink or inexperience from entering into such a contract, which could never have been set aside if he had lived, and filed a bill for the purpose. The Defendant, *Robert Williamson*, stood in no fiduciary position whatever towards *Tate;* his commission being limited to an arrangement of his debts for £500. *Tate* refused to listen to such a proposal, and thereupon the Defendant's agency or commission ceased. The ordinary relation of vendor and purchaser was created, and it would be stretching the doctrine of agency and of the protection afforded by the Court to persons of tender years and improvident habits against their own improvident bargains to a most dangerous extent, if this sale were to be set aside: Lord *St. Leonards'* V. & P. (1).

SIR W. PAGE WOOD, V.C.:—

This case is one of a very painful nature, and has been put forward with somewhat undue exaggeration, but persons who intermeddle with transactions of this kind have themselves alone to blame if in the course of the investigation, before the transaction can be fully sifted, many imputations which may not be established are made upon their characters and motives. I am thankful, however, to be able to relieve both these Defendants from much of the imputation to which they have been subjected. The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or

(1) P. 688, 14th ed.

trust is reposed, to exert influence over the person trusting him, the Court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. This unfortunate young man being in difficulties and embarrassments of a serious character, or rather which were, in his opinion, serious, the Defendant *Robert Williamson*, as representing his uncle *H. H. Williamson*, *Tate's* great uncle and trustee, took upon himself to advise the young man in reference to the arrangement of his difficulties. The young man having then said that he was determined to dispose of his property, it was absolutely impossible for *Robert Williamson*, filling as he did that position of confidential adviser, to enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value. One most important piece of information—*Cope's* report as to the value of the minerals, which he put for the whole estate at £20,000, being, in respect of a moiety, £3000 more than the Defendant gave for it, minerals, surface and all included—was, during the negotiation, obtained by the Defendant and kept back from the person with whom he was dealing. This circumstance renders it at once impossible that the contract can be maintained. It has been said, "What could *Robert Williamson* have done?" To which I answer, "Why did he not tell this young man to consult some mining surveyor, or Mr. *Cope*, the gentleman whom he had himself consulted?" No doubt, as has been said by Defendant's counsel, nothing was more natural than that a person entering into a bargain for a property like this should consult the best mineral surveyor he could meet with as to the value, and this was just the advice which the Defendant should have given. "Do that which every person should do, just as much vendor as purchaser, consult the best mineral engineer you can find." Instead of which he advised him to consult first his father, whom it was impossible to consult under the unhappy circumstances, and then Mr. *Payne*, of whom he (Defendant) knew little or nothing. The Defendant, indeed, thinks that *Cope's* valuation was exaggerated. But nothing could be more simple than to have mentioned this, in advising the

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young man to consult some mining engineer, either Mr. *Cope* or some other person of equal skill. If that had been done, no one could have questioned the purchase, or placed the Defendant in any difficulty whatever.

His Honour, after adverting to *Tate's* quarrel with his father, his extravagance and difficulties, and the position of *Robert Williamson* as deputed by his uncle to receive the rents and manage the other moiety of the settled property, continued:—

It is a fallacy to contend that *Robert Williamson's* mission was limited to seeing if *Tate's* debts could be compromised, and that his agency ceased with the refusal of *Tate* to allow his debts to be compounded for. An arrangement of them by payment in full was as open as an arrangement by compounding them.

The answer by *Tate* to his great uncle's offer of £500 to be applied in payment of his debts, that unless they were paid in full his character would be injured, at once afforded an insight into the young man's character as a man of business. Though not incapable of managing his affairs, this interview was conclusive as to his experience of the world. More than this, he says (in the letter to his aunt) that he was so harassed and confused he did not know where to turn. His father would have nothing to do with him, and he went to his great uncle, who sent up the Defendant, *Robert Williamson*, as his deputy to advise him. Then came this very remarkable circumstance.

The Defendant, *Robert Williamson*, admits that he had previously had some intention of purchasing the estate. Only £1000 was then charged upon the estate, and an immediate sacrifice of it was certainly not the best way of arranging the difficulties of the young man. Why was it never suggested that the sum necessary for paying the young man's debts might be raised by a further mortgage? But, unhappily, *Robert Williamson* going to London as he did with this preconceived wish to buy the property, was not in a position to offer unbiassed advice. The important and turning-point of the case, however, is that in the interval, during which *Tate* was to consult his father or Mr. *Payne*, *Robert Williamson* sent to Mr. *Cope*, an eminent mining engineer, to inquire as to the value of this property. The valuation given by Mr. *Cope*

(who had every opportunity of informing himself) for the minerals under the entire estate was £20,000, and by the Defendant's own witnesses, the value of the entire surface is placed at £11,000, thus giving more than £15,000 as the value of the moiety for which he was offering £7000. In reference to the letter of the 10th of September, I do not impute to *Robert Williamson* anything so base as that he advised the young man to consult his father, when he knew perfectly well that he would not do so. But I do impute this to him, that, having got this information from *Cope*, he did not wish to incur the responsibility of conducting the purchase himself, knowing how difficult it would be to sustain such a transaction, having regard to the position of the uncle, and the confidence reposed in him as representing that uncle by the vendor. He did not wish to sustain the burden that would be thrown upon him if he purchased this property from so young a man, without any further advice or assistance than that which he had himself given. He seems to have thought that if the young man were once put by him in independent hands, then that the rule *caveat venditor* would apply, and that he would be relieved of the burden. The letter then goes on to speak of the agreement as if there was one already existing, and a sort of merit is made of the being ready to cancel it, when in fact the young man was in no way bound. There is much depreciation of the property; but the letter throughout does not point to obtaining that advice which of all others ought to have been taken by *Tate*—that of some mining agent. The question is not whether persons of unscrupulous character, such as the money-jobbers alluded to by Mr. *Payne*, would have given no more for the property, but whether the Defendant, with this knowledge in his breast, derived from *Cope's* report, and not communicated to *Tate*, is entitled to hold his purchase. The agreement having been put into shape by Mr. *Payne* in October, 1859, the matter was not finally concluded until April, 1860, the young man dying in the May following. The circumstance that *Tate* was ill at the time when he executed the conveyance is of little consequence if the agreement is good, so long as he knew that he was executing a deed in conformity with the agreement. In the interval, he was never informed of *Cope's* valuation, nor of any single circumstance beyond what he might

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have derived from *Payne's* statement that the other moiety had been valued at £8000. In this state of things the agreement is completed by the execution of the deed; and from that time to this there has been no acquiescence by the father, who, as soon as he was informed of the purchase, protested as heir-at-law and administrator against the arrangement. Putting aside a great number of smaller questions that arise, it is enough to say that the keeping back this important document, the valuation made by *Cope*, is quite sufficient to upset this transaction made with a young man only twenty-three years old, pressed with embarrassments, and confiding his affairs to the Defendant, *H. H. Williamson*, by whom *Robert Williamson* was deputed to go and arrange his difficulties for him. Though every owner of property has a right to sell and deal with it as he pleases, yet he has a right to all the information he can get from the persons dealing with him if they profess to give him advice with reference to his extrication from the difficulties in which he is placed. On the question of value, I am of opinion, upon the evidence, that the property is of very much greater value than the price which has been given for it. With respect to the other Defendant, *H. H. Williamson*, I dismiss him without costs, as he now disclaims any interest. But this was by no means so clear when the bill was filed. In his first answer he says that he had always intended to make a present to his nephew, *R. Williamson*, of what might be necessary for the purchase of this property. In his answer to the amended bill he says that he told him that he would advance him money to any extent that was necessary to acquire this property. In his own ledger, all these payments are entered as being made to the intestate *W. C. Tate* for *Robert Williamson*. There seems to have been some indecision of purpose as to whether or not an absolute gift was intended at that time; and it is not at all clear that *H. H. Williamson* had no interest at the time of filing the bill. The real truth seems to be that he has bought the estate for his nephew, and in dismissing him, as he claims no longer any interest, I cannot say that the Plaintiff was wrong in bringing him here. It was his duty, placing himself as he did in the position of a purchaser, to have informed this young man of the value of the minerals under the property, derived from *Cope's* valuation; but he seems to have consulted

his kind regard for his nephew at the expense of his great nephew, and under the circumstances I cannot give him any costs. I entirely absolve both Defendants of any deliberate scheme of fraudulently obtaining this young man's property, but they failed in their duty towards him in the position in which he stood.

MINUTES:—Dismiss the bill, without costs, against *H. H. Williamson*.

Declare that, under the circumstances established in evidence, and in particular having regard to the youth and embarrassments of the intestate, *W. C. Tate*, and the duties which the Defendant, *R. Williamson*, had undertaken of advising him with respect to the arrangement of the claims of his creditors, it was not competent for the said Defendant to become the purchaser of the intestate's moiety of the *Whitfield* estate and of minerals thereunder, without communicating to the intestate all the information which he had acquired with reference to the value of the property, and in particular, without communicating to the intestate the estimate obtained by the Defendant from Mr. *Cope* in the pleadings mentioned.

Declare that the agreement of the 5th of October, 1859, ought to be set aside, and the conveyance made in pursuance thereof ought to stand as a security for moneys paid by said Defendant.

Direct an account of moneys so paid, rents and profits, &c. Payment by Plaintiff of balance, and on such payment a conveyance. Costs of suit to be paid by Defendant, *R. Williamson*.

Solicitors for the Plaintiff: Messrs. *N. C. & C. Milne*.
Solicitors for the Defendants: Messrs. *Clowes & Hickley*.

MITCHELL *v.* STEWARD.

Injunction—Covenant by Purchaser in Fee—Breach of Covenant—Acquiescence—Waiver.

Defendant *A.* was the purchaser in fee of a house and premises, part of an estate formerly the property of the Plaintiffs, of which all the purchasers of such parts as were sold (including *A.*) were under a covenant not to use the house and premises so purchased, or any part thereof, as a public-house or beer-shop. *A.* built a shop at the back of his premises, and on the 11th of February, without consent, but without interference, on the part of the Plaintiffs opened it as a beer-shop. In June he leased the beer-shop to the co-Defendant *B.*, who carried on the same business with the consent of *A.*, but equally without consent of the Plaintiffs, who, on the 8th of July, served *B.* with notice to desist. It further appeared that a purchaser

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of another house on the same estate had also, without consent, but without interference on the part of the Plaintiffs, opened a beer-shop at the back of his premises.

The bill for an injunction was filed on the 1st of August:—

Held, that the conduct of the Plaintiffs did not amount to such a degree of acquiescence and waiver as to preclude them from the right of enforcing the covenant.

THIS was a motion on behalf of the Plaintiffs, who were the former owners of a house, No. 1, *Hill Park Crescent, Tavistock Road, Plymouth*, and are the present owners of adjoining houses, against the Defendant *Steward*, who was a sub-purchaser of the house No. 1 and plot of land on which it stood, and another Defendant, *Stranger*, who was a lessee of *Steward*, for an injunction to restrain them from making any alteration in the front or elevation of the house without the consent in writing of the Plaintiffs; and from using the house and premises, or any part thereof, as a public-house, beer-shop, temperance hotel, or place of public entertainment or amusement, or for any noisome or offensive trade or business or manufacture.

In 1857 the Plaintiffs sold the house in question to *Gibson*, one of themselves, in fee, the conveyance containing a covenant by *Gibson*, for himself, his heirs, executors, administrators, and assigns, in the terms above stated. In 1862 *Gibson* sold the premises to the Defendant *Steward*, and *Steward*, by his purchase deed, covenanted with *Gibson* to observe the covenants in *Gibson's* conveyance.

Soon after his purchase *Steward* erected on the premises additional buildings at the back, which he converted into shops, still retaining the front as a dwelling-house; and in February, 1865, he began fitting up one of these houses in the rear as a beer-shop. Having obtained a beer license, he opened the public-house on the 11th of February.

On the 9th of June, 1865, *Steward* leased the premises to *Stranger* for ten years, without any covenant against the use of the same as a public-house or beer-shop, but with a covenant that the lessee was not to carry on any business in front of the premises without *Steward's* license.

On the 8th of July following the Plaintiffs served the Defendant *Stranger*, who had also obtained a beer license, with notice to

desist from the sale of beer on the premises, of which sale they alleged they became aware only about a fortnight previously; and this bill was filed on the 1st of August. The injunction was moved for on the 4th of August, and having stood over on mutual undertakings, was now turned into a motion for decree.

The bill alleged that no one else on the estate sold beer besides the Defendants and a person named *Prout*, who had bought a part of the property under a similar covenant about nine years previously, and some years ago applied to the Plaintiffs for leave to sell beer, which was refused. Very recently *Prout* had commenced using his house for this purpose, and the Plaintiffs said they intended to file a bill against him.

The Defendant *Steward's* case was, that his proceedings in fitting up the premises at the rear as a beershop were acquiesced in by the Plaintiffs, and notorious from the fact of his having painted upon the side front of the shop the words, "Wines, draught and bottled ales, &c.," and "Refreshment bar;" and that the whole of the Plaintiffs' building speculation in *Hill Park Crescent* having failed as an attempt to acquire private residences of best class, the house at the other end of the crescent had, without any interference on the part of the Plaintiffs, been converted by the sub-purchaser, *Prout*, into a public-house called *The Windsor Castle*, whilst others had been used as a grocer's shop, a builder's yard, &c. He admitted, however, that upon the occasion of the lease it was arranged between him and his tenant *Stranger*, who, he said, was fully aware of the covenant, that there was to be no appearance of a beer-house towards the front of *Hill Park Crescent*, but that the sale of liquors should be carried on by means of a side entrance. He also said he told *Stranger* that the Plaintiffs had acquiesced in his proceedings, and that he thought they would not interfere with him (*Stranger*), but that he (*Stranger*) must take on himself the risk. This statement was confirmed by the solicitor who acted for both parties in the matter of the lease.

The Defendant *Stranger's* case was, that from about the end of 1864 the business of a beer-seller was openly carried on at the back of No. 1, *Hill Park Crescent*; that, seeing the premises advertised to be let, with the words, "Would be let for an hotel or lodg-

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ing house, if required," he took the lease, intending to use the house as a private hotel. He denied that he ever, directly or indirectly, had notice of the covenant.

Mr. *Rolt*, Q.C., and Mr. *W. W. Mackeson*, for the Plaintiffs:—

The Defendant *Steward* is bound by express covenant, and *Stranger* had express notice. But even if, as *Stranger* asserts, he had no express notice, he is nevertheless bound by his landlord's covenant: *Robson* v. *Flight* (1).

Mr. *Ince*, for the Defendant *Steward*:—

The Plaintiffs themselves have expressed a doubt as to whether the covenant extends to the back of the house. At all events, *Steward* is an unnecessary party to this suit. All breach of covenant by him has necessarily ceased since the 9th of June. *Stranger*, if any one, is the wrong-doer, and the only person whom it is necessary for the Plaintiffs to restrain. In any view of the case, the Plaintiffs have waived their rights.

Mr. *E. E. Kay*, for the Defendant *Stranger*:—

If the Defendant has been guilty of any wrong-doing, he was led into it by his lessor, who admits the agreement between himself and *Stranger*. The alteration in the state of the property now complained of was made and completed before the filing of the bill, and there is no case for an injunction against *Stranger*; the Plaintiffs, who allowed this breach to go on uninterrupted, have no claim to damages.

[The VICE-CHANCELLOR said he thought, upon the slender evidence he had before him throughout the whole case, that all he could do was to give the Plaintiff a remedy by injunction, which would extend only to future acts, saying nothing about damages.]

As to the injunction, the deeds containing these covenants were conveyances; and it is now perfectly well settled that covenants in such deeds will not run with the land so as to bind a purchaser. The only cases in which such covenants have been enforced are

(1) 34 L. J. (Ch.) 101; 11 Jur. (N. S.) 147.

where there was gross inequitable conduct, the purchaser having full notice. In this instance the Defendant was completely misled by the Plaintiffs and his landlord; and considering that here there is no legal privity, as in the ordinary case of landlord and tenant, the Court will not interfere to enforce this covenant on behalf of the Plaintiffs, who have not only acquiesced, but, by permitting another house on the same property to be used as a public-house, actually waived their rights: *The Duke of Bedford* v. *The Trustees of the British Museum* (1); *Roper* v. *Williams* (2).

SIR W. PAGE WOOD, V.C.:—

I think in this case the injunction prayed by the bill must be granted in the terms of the covenant.

A distinction has been attempted to be drawn between a covenant in a lease and a covenant in a conveyance, with notice of which, it is said, a lessee of the purchaser is not affected; and against that covenant, it is said, the lessee has an equity if he has been misled by the acquiescence and laches of the vendor.

The only question is, how far the general course of the Court is affected by what has been done in this case.

The Defendant *Stranger* denies that he had knowledge of the covenant. On the other hand, the Defendant *Steward*, his lessor, asserts that *Stranger* was as well aware of that right as *Steward* himself, or the vendors; and that an arrangement was made whereby *Steward*, though conscious that he could not, without a direct breach of the covenant, attempt to do anything of the kind suggested by *Stranger*, yet thought he could manage to dispose of his property in this sort of way. He tells *Stranger* that he has been carrying on this business unmolested, and that another house has been carrying it on, and "therefore," he tells him, "in all probability you will not be interfered with;" and then he takes a covenant from *Stranger*, his lessee, by which *Stranger* undertakes that he will not "make any alterations in, or carry on any business in the front of, the said demised premises, or make any alterations in any other part of the said premises, without the sanction of the said *William Steward*, his heirs or assigns." Therefore, if at any

(1) 2 My. & K. 552. (2) T. & R. 18.

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time *Stranger* were to commit a breach of *Steward's* covenant, *Steward* could put a stop to it.

In this state of circumstances, the simple course for *Steward* to have taken was, to ask the Plaintiffs whether or not they had waived their rights? Nothing could have been more simple or easy than this; and that would have disposed of the question of acquiescence.

The facts seem to be—that as regards part of the premises, this so-called acquiescence has continued for something less than six months. There being this distinct covenant in the original conveyance, that "the front or elevation of the dwelling-house erected on the said piece of land shall not be at any time hereafter altered without the consent in writing" of the vendors; and that "the said dwelling-house and premises shall not be used as a public-house, beer-shop, temperance hotel, or place of public entertainment or amusement, nor for any noisome or offensive trade, or business, or manufacture;" the sub-purchaser *Steward* covenants "that he, his heirs, appointees, and assigns, shall and will at all times hereafter well and faithfully observe and perform and keep the several covenants and agreements" in the former indenture expressed and contained, on the part of the purchaser to be observed and performed, "as if the same had been repeated in these presents, and made by the said *William Steward*, binding himself, his heirs, appointees, executors, administrators, and assigns, to and with the said parties to the same indenture, their heirs, executors, and assigns."

There can be no doubt that the covenant extends to all the premises; and what *Steward* did was to build a house at the rear of the premises, a long way back, which he converted into a beer-shop. He did not alter the front of the dwelling-house in any way, but he says that, "on the wall on the side front of the shop were the following words in very large letters:—"Wines, draft and bottled ales, cider, &c.," and a hand pointing, "Refreshment bar." From the 11th of February to the 9th of June this business was carried on by *Steward* in this back shop, and afterwards by *Stranger* up to the filing of the bill on the 1st of August.

Now, the Plaintiffs must have been aware of what was going on. Indeed, they virtually admit it, for what they say is: "We were not aware of the Defendant *Steward's* intention as to the sale of

beer in the shop referred to by him, and never gave any consent thereto; but inasmuch as the same shop is a separate building from the house in *Hill Park Crescent*, and fronts the *Tavistock Road*, the sale of beer therein did not affect the houses in *Hill Park Crescent* as private residences, and we were not sure that the restrictive covenant applied to the land at the back of the main house." I do not think that this doubt would have availed them much had there been a sufficient amount of acquiescence on their part, in allowing the Defendant to commence and carry on a business of this kind.

But I cannot consider that the conduct of the Plaintiffs amounts to such a degree of acquiescence as to deprive them—considered, as they may be, as trustees on behalf of the other purchasers of the neighbouring property—of the right to enforce this covenant. Indeed, what the Defendant *Steward* himself represents that he said to *Stranger* was, that "I thought the Plaintiffs would not interfere, but he must take on himself the risk."

As regards the other ground upon which acquiescence is placed, we have not got the exact details. But it is stated that "very recently before the filing of the bill," a purchaser of another house, originally belonging to the same estate, and under a similar covenant, has commenced using his house for the sale of beer; and the Plaintiffs, on the 3rd of August, say they have prepared and intend to file a bill against him. The Defendant *Steward*, however, states that on the 7th of November last he was informed by this purchaser, who is named *Prout*, that no proceedings up to that time had been prosecuted against him as his tenant. Here, then, there is a row of some thirty houses, all of a specific character, and at the extremity of the row, and upon a part of Mr. *Prout's* premises, which looks out upon a back lane, and cannot be seen from the front of the row, a sale of beer is carried on, in a way which, it is said, does not affect the character of the houses in front, and these Plaintiffs not being ready to rush into litigation, do not think it necessary in this instance to interfere. On the one hand, the consent of the Plaintiffs was not asked; on the other they have not filed a bill; and the question is whether, under these circumstances, the Plaintiffs have lost the right to put this covenant in force.

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To say that acquiescence for these few months, in these two instances, has deprived the Plaintiffs of their right, would be, I think, to carry too far the dictum in *The Duke of Bedford* v. *The Trustees of the British Museum* (1) and *Roper* v. *Williams* (2). In the former of these cases the attempt was to restrain the erection of buildings not of uniform character with others, and *Roper* v. *Williams* was a case somewhat similar.

Here, whatever these Defendants have done, they have done with their eyes open, and persons in that situation are not in the most favourable position to rely upon acquiescence and laches.

I think the case is clear against both Defendants, and there must be an injunction as prayed, inserting, as in the covenant, the words "in writing" after "consent."

Solicitors for the Plaintiffs: Messrs. *Surr & Gribble.*

Solicitors for the Defendants: Messrs. *Clowes & Hickley.*

V.-C. W. 1866 *Jan.* 13; *Feb.* 19.

PENN *v.* BIBBY.

Patent—Practice—Particulars of Objections—Amendment.

Particulars of objections filed by a Defendant were ordered to be amended by the insertion of words specifying "the persons by whom, the places where, the dates at, and the manner in which," there had been the alleged user prior to the date of the Plaintiff's patent.

In complying with this order, the Defendant was permitted, in his amended particulars, to preface his statement of the specific instances of alleged prior user with the words "amongst other instances," in order to give him an opportunity of applying for leave to re-amend by inserting any further instances of prior user which he might discover.

Upon an application by Defendant for leave to re-amend objections by inserting certain further specified instances which had come to his knowledge, he was ordered to pay the costs of the application, and the costs arising out of and consequent upon the re-amendment were reserved.

THIS was an adjourned summons. The suit was for the infringements of a patent; and the Defendant had filed particulars of objections.

On the 17th of November, the Defendant had been ordered, upon the application of the Plaintiff, to file amended particulars stating

(1) 2 My. & K. 552. (2) T. & R. 18.

"the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which," wood was alleged to have been used, prior to the date of the Plaintiff's patent, in the construction of, &c. (following the words of the original particulars), and also stating "the names and addresses of the persons by whom, and the places where, and the dates at, and the manner in which," pieces of wood, prior to the date of such patent, were alleged to have been fixed, &c.

The Defendant had accordingly filed other particulars, which, as far as is material, were as follows:—

"The alleged invention, the subject of the Plaintiff's alleged patent, was not new at the date of such patent, inasmuch as wood had, prior to the date of such patent, been used in the construction of, &c., in the following, *amongst other instances*, namely, in the year 1851," &c.

"The alleged invention, &c., was not new, &c., inasmuch as pieces of wood had, prior to the date of such patent, been fixed, &c., in the following, *amongst other instances*, namely, &c.

The present application was on behalf of the Plaintiff, that the Defendant might be ordered to comply with the order of the 17th of November. Several objections were raised, the only one of general interest being to the insertion of the words "amongst other instances."

Mr. *Theodore Aston*, for the Plaintiff, said that the insertion of these words nullified the particularity of the instances of the breaches which were specified.

Mr. *E. E. Kay*, for the Defendant, justified the use of the words "amongst other instances," by reference to the report of *Curtis* v. *Platt* (1).

SIR W. PAGE WOOD, V.C.:—

I think these words "amongst other instances" may be permitted to remain, in order to give the Defendant the benefit of a general saving, and liberty to apply for leave to give particulars of other instances of prior user, if and when he may find them; but expressions like this are often introduced into par-

(1) 8 L. T. (N.S.) 657.

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ticulars for no useful or legitimate purpose, and their insertion is not generally desirable, as they tend only to obscure the record, and to confuse the case when it comes before the judge and jury.

The other objections were allowed.

Mr. *Aston* asked for the costs of the application.

Mr. *Kay* asked that the costs might be costs in the cause as was ordered in *Curtis* v. *Platt*.

The VICE-CHANCELLOR:—The Defendant has been ordered to do a certain thing, which he has failed to do effectually, and I must give the Plaintiff the costs of this application.

Feb. 19. The Defendant now applied by summons (adjourned into Court this day) that he might be at liberty within a week to amend the amended particulars of his objections, by adding to the second paragraph thereof "and also in the following instances, that is to say, &c." (specifying seven instances).

Mr. *Kay*, for the Defendant, referred to the 41st section of the *Patent Law Amendment Act*, 15 & 16 Vict. c. 83.

[The VICE-CHANCELLOR observed that the application was not one which the Court would regard with favour, as it looked very much like an indirect mode of gaining time. If that had been desired, the Defendant should have moved for leave to extend.]

The Court had permitted the words "amongst other instances" to remain for the express purpose of such an application as this. In *Renard* v. *Levinstein* (1) leave was given to a Defendant, even during the progress of the trial, and after the Plaintiff's case had been concluded, to amend his particulars of objection by stating a prior publication of the invention, on the terms of his payment of the costs occasioned by the amendment.

Mr. *Aston*, for the Plaintiff, opposed the application. *Renard* v *Levinstein* was a question of prior publication by way of specification, involving no great additional expense, whereas here the instances of alleged prior user were taken at various detached spots throughout the United Kingdom. If in the view of the Court

(1) 13 W. R. 229.

these instances of user should be necessary, the Plaintiff could not oppose the application, but the Plaintiff must have his costs of, and consequent upon, the application.

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The VICE-CHANCELLOR said he thought he must grant leave to amend the particulars of objections by introducing the instances mentioned in the summons, and also three other instances which had been mentioned by Mr. *Kay* at the bar; but on the terms that the Defendant pay the costs of the application; and any additional costs occasioned by the introduction of the instances now proposed to be introduced must be reserved specially.

Solicitors for the Plaintiff: Messrs. *H. R. Hill & Son.*

Solicitors for the Defendant: Messrs. *Norris & Allen.*

In re MERRICKS' TRUSTS.

V.-C. W. 1866 *Feb.* 10, 27.

Will—Construction—Substituted Gift to Children—Time of Vesting—Conjunctions "or" and "and"—Remoteness.

Where there is a gift by will, "upon the death of *A.*, to *B.*, *and* if *B.* shall be then dead, to *B.*'s children;" if *B.* dies before *A.*, it is not necessary that *B.*'s children should survive *A.*, in order to entitle them to vested interests; following *Lanphier* v. *Buck* (1); and there is no difference in the result, if the gift be, "upon the death of *A.*, to *B.*, *or* if *B.* shall be then dead, to *B.*'s children;" overruling the doubt intimated in *Crause* v. *Cooper* (2).

But there is a difference in the result of the two forms of limitation, as regards those children of *B.* who may have died in the lifetime of their parent; if the gift be preceded by the word "and," it is an original gift, and all the children of *B.* will take; if it be preceded by "or," it is substitutionary, and those children only will take who survive their parent.

Therefore, where a fund was bequeathed to four persons, *R.*, *E.*, *S.*, and *H.* by name, "who should be then living, or to the children of such of them as should be then dead," the event indicated by "then" being one which might fall beyond the limit fixed by the rule against perpetuities—and *S.* died before the event:—

Held, that the gift to the children of *S.* was not void for remoteness, and that all the children of *S.* who survived her participated in the gift, whether living or not at the period of distribution; but that none of the children of *S.* who died in her lifetime participated in the gift.

RICHARD MERRICKS, by his will dated the 2nd of June, 1821, directed his trustees to invest the sum of £4000, and to

(1) 34 L. J. (Ch.) 650. (2) 1 J. & H. 207, 213.

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stand possessed of the fund upon trust, to pay the income to his son *Richard Merricks* for life, and after his decease, in case *Richard Merricks* should intermarry with any wife, and should leave her him surviving, to pay the income to "such wife of *Richard Merricks*," for her life, "and after the decease of the survivor of them, *Richard Merricks*, and of any wife he might leave him surviving," then upon trust for all and every the children and child of his said son *Richard Merricks*, absolutely, in equal shares if more than one, who should live to attain twenty-one, or being daughters or a daughter, should be married with consent as therein mentioned.

Testator then proceeded as follows: "But in case my said son *Richard Merricks* shall die without leaving lawful issue, or leaving lawful issue, such issue being a son, shall not live to attain the age of twenty-one years, or being a daughter shall not attain that age or be married as aforesaid, then upon trust, immediately after the decease of my said son *Richard Merricks*, and of any wife with whom he may have intermarried, and of the survivor of them, to pay, assign, and transfer the said principal trust stocks and funds in equal shares and proportions between and amongst my four daughters, *Elizabeth*, the wife of *George Buckton* the younger, *Louisa Merricks*, *Susanna Woodyer Merricks*, and *Harriet Merricks, who shall be then living, or to the lawful issue of such of them as shall be then dead*, such issue taking the part or share which their, his, or her mother would have been entitled to had she been then living; such share to be divided in equal parts and proportions amongst the children of such of my daughters who shall be then dead, if more than one, and if but one, then the whole of such my deceased daughter's share shall go and be paid to such only child; and if neither of my said daughters shall be then living at the decease of my said son *Richard Merricks* and his wife without leaving lawful issue as aforesaid, then I direct that the whole of the said trust stocks and funds shall be divided between and amongst all my grandchildren, being children of my aforesaid daughters, equally between them."

The testator further directed his trustees in like manner to invest the three several further sums of £3000, £3000, and £3000 sterling, in trust as follows: "For the use and benefit of my said

daughters, *Louisa Merricks*, *Susanna Woodyer Merricks*, and *Harriet Merricks* respectively, and their respective issue, lawfully begotten, upon exactly the same trusts, and to and for the same ends, intents, and purposes, with regard to my said daughters *Louisa Merricks*, *Susanna Woodyer Merricks*, and *Harriet Merricks*, and any husband that they may leave them surviving, and the lawful issue of them my said daughters respectively, with remainder over, on failure of issue, to my said son and my other daughters and their issue, as are heretofore declared with respect to the said sum of £4000 hereinbefore directed to be laid out for the benefit of my said son *Richard Merricks*, and any wife and issue he may leave."

By a codicil, dated the 26th of June, 1822, the testator reduced the legacy in favour of his daughter *Louisa* (then the wife of *John Cursham*) to £1000.

Testator died on the 26th of June, 1822; *Richard Merricks* died in 1848, never having had a child, but leaving a widow, who was still living.

Of the four daughters of the testator, *Elizabeth*, the wife of *George Buckton*, died in 1842, having had eight children, of whom five were now living. Of the three who were dead, one died an infant in the lifetime of his mother; another attained twenty-one, and died in the lifetime of the testator's daughter *Louisa;* and the third married *George Henry Darby Lawrence*, and died in 1845, leaving one child only, *Henry Buckton Lawrence*, who was now of age.

Testator's second daughter, *Louisa*, having married *John Cursham*, who died in 1825, in 1834 again married *George Thomas Falcon*, who died in 1854; and on the 9th of January, 1864, she died, without ever having had a child.

The third daughter, *Susanna*, in the year 1852, married *Charles Bowdler*, upon which occasion her share was put into settlement.

Upon the occasion of Mrs. *Falcon's* death, this Petition was presented by Mr. and Mrs. *Bowdler*, and the trustees of their marriage settlement, and *Harriet Merricks*, praying that one-third of a fund in Court representing the £1000 legacy might be transferred and paid to Mr. and Mrs. *Bowdler's* trustees, and another third to *Harriet Merricks*.

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The Petition did not purport to deal with the remaining third; but its destination would necessarily be involved in the decision.

The contest was raised upon the construction of that part of the will which declared the trusts of *Louisa's* £1000 legacy by reference to the £4000 legacy clause; and here the question was, whether or not the gift to the issue of such of the testator's daughters as should be dead at the period of distribution, was void for remoteness; such period of distribution being the death of the survivor of the testator's son *Richard Merricks*, and any wife with whom he might intermarry.

It was admitted by all parties that the word "issue" must be read throughout the will as signifying "children."

It thus appeared that the above question depended upon another, namely, whether the bequest to the issue (*i. e.*, children) of such of the testator's daughters as should be dead at the period of distribution did or did not give them vested interests before the period of distribution.

Mr. *Rolt*, Q.C., and Mr. *Wickens*, for the Petitioners:—

It is admitted that, if the shares be not vested, a gift from and after the death of any husband or wife with whom a child may intermarry is void for remoteness: *Lett* v. *Randall* (1).

In the case, however, of Mrs. *Falcon*, who had no husband living at the time of her death, this rule would have no application.

But in this case the gift in remainder is perfectly good. Upon the death of the survivor of *Louisa* and any husband with whom she may intermarry, there being no children of *Louisa*, her legacy is to go over to such of the testator's sons and daughters by name as shall be then living; "or" to the children "of such of them as shall be then dead," not to the children "who shall be then living" of such of the daughters as shall be then dead. This shews that the period of vesting in the children is the death of the mother, not the death of the survivor of *Louisa* and any possible husband. It follows, that if a child of a deceased daughter survive her mother, and die before the period of distribution (as in the case of Mrs. *Lawrence*), her share is vested.

(1) 3 Sm. & Giff. 83.

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But inasmuch as, upon the true construction, it must be held that the gift to children of a deceased child named in this will is not an original gift, but only in substitution for the share the parent would have taken, it also follows that a child of a deceased daughter dying in her mother's lifetime will take nothing: *Lanphier* v. *Buck* (1).

Mr. *Batten*, for the trustees of Mrs. *Lawrence's* settlement, supported the same construction, and cited *In re Wildman's Trusts* (2).

Mr. *G. M. Giffard*, Q.C., and Mr. *H. Cadman Jones*, for the trustees of the settlements of three of Mrs. *Buckton's* daughters:—

The gift over, being limited after the death of *Louisa* and any husband with whom she may have intermarried, is void for remoteness, and falls into the residue. The case is governed by *Lett* v. *Randall* (3), which was followed in *Buchanan* v. *Harrison* (4); and there is no ground for the distinction attempted to be drawn, that where there is no husband or wife surviving the event qualifies the application of the rule.

The gift to the children of such of the daughters as shall be then dead, in this instance, is substitutionary. In *Lanphier* v. *Buck* (5) the words were "*and* to the issue of such of them as may be then dead." Here the conjunction is "or," not "and;" and the validity of the distinction between these two forms of expression is recognised in *Crause* v. *Cooper* (6); the difference being, that where the gift to the children is in substitution for the gift to the parent, the same obligation is imposed upon the children as upon the parent, namely, that, in order to take, they must survive the tenant for life.

The words of this will, taken by themselves, extend to every contingency. The testator has manifestly excluded all his own children dying before the period of distribution; then, why should he be supposed not to have equally excluded all his grandchildren dying before the period of distribution, whether in their parents'

(1) 34 L. J. (Ch.) 650, 657; 11 Jur. (N. S.) 837, 839.
(2) 1 J. & H. 299.
(3) 3 Sm. & Giff. 83.
(4) 1 J. & H. 662, 665.
(5) 34 L. J. (Ch.) 650; 11 Jur. (N.S.) 837.
(6) 1 J. & H. 207, 213.

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lifetime or not? In the case of *Re Pell's Trust* (1) the Lord Justices were divided in opinion, and Lord Justice *Turner*, in supporting the decision of Vice-Chancellor *Stuart*, said that this was hardly the first time their Lordships had agreed to differ on the point. [They also cited *Bennett* v. *Merriman* (2).]

Mr. *Haynes*, for the trustees of the testator's will, said that *Lanphier* v. *Buck* had been followed by Vice-Chancellor *Kindersley* in a case of *Re Turner* (3).

Mr. *Daniel*, Q.C., for two sons of Mrs. *Buckton*.

Mr. *Wickens*, in reply:—

It is remarked by Vice-Chancellor *Kindersley*, in *Lanphier* v. *Buck*, that the case of *Bennett* v. *Merriman*, before Lord *Langdale*, turned upon very peculiar language, and was followed by another, *Masters* v. *Scales* (4), in which his Lordship thought it was not necessary that the children should survive the tenant for life when the gift was by substitution.

The authorities of *Lett* v. *Randall*, *Lanphier* v. *Buck*, and *In re Pell's Trust*, are conclusive, unless there be any force in the distinction between "or" and "and." In *Crause* v. *Cooper* the *dictum* is collateral only to the main issue; and from the Vice-Chancellor *Kindersley's* view of the subject, the distinction would seem to be of no weight. The meaning of the word is copulative, and it is not intended to divide the class.

Feb. 27. SIR W. PAGE WOOD, V.C.:—

The question in this case, arising upon the will of *Richard Merricks*, which is framed in a manner not altogether consonant with strict and careful limitations, is, whether or not, in the events which have happened, a limitation over of a particular legacy, originally given to *Louisa Merricks*, is void in consequence of its being limited to persons who were not in *esse*, or who might not be in *esse*, within the period allowed by law with reference to the doctrine of perpetuities.

(1) 3 D. F. & J. 291, 295.
(2) 6 Beav. 360, 366.
(3) 34 L. J. (Ch.) 660.
(4) 13 Beav. 60.

Now the will is in these terms. [His Honour read the provisions of the will and stated the facts].

In that state of things the question is, whether or not this limitation over of *Louisa's* share is too remote. That depends mainly upon the question, whether or not the interest taken by the children of the brother and sisters is an interest which requires them to be living at the period of the division of the fund. The limitation over is to the brother and sisters who may be then living, or their issue—issue there meaning evidently children, in the same manner as in *Richard Merricks's* case.

Upon that question there has been a great deal of discussion from time to time, and the authorities, at present, are in such a situation that I feel myself justified in holding that there is no necessity for the issue of deceased children, in circumstances like these, to survive the period of distribution, although the deceased parent may have been required to survive that period. There is now so considerable an amount of authority, I may say of the Appeal Court as well as of the Courts below, that I shall adhere to that decision. The only difficulty that has at all pressed upon my mind is—not this question of whether there is, or is not, this vested interest, but the question as to the state of the law with reference to those children of Mrs. *Buckton* who died in her lifetime, and, therefore, of course, died before the period of division also.

Now, I apprehend, with regard to the original point, the principle upon which the Court proceeds is to vest the estate as early as possible. That is the principle upon which I find the decisions which precede some of my own upon the same subject have been grounded. The anxiety of this Court, at all times, has been to take care that the estate shall vest at as early a period as possible; and, therefore, the Court has said, when it finds certain life estates interposed, that those life estates are not to postpone the vesting of interests under the limitations in favour of the persons who will take subject to those life interests.

In this particular case it would be most unfortunate if one were obliged to hold otherwise, because there is this peculiarity in the case: The will is very inartificially constructed; the clear object being not to postpone the vesting to the life interest of the

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possible husband, or possible wife, but simply to postpone the possession of those interested in remainder to the interest of the possible husband or wife. That is the particular object of this will, inasmuch as the contingency upon which all is made to depend has nothing to do with the death of the possible wife or possible husband, the real contingency is, whether *Louisa* should die without leaving children. That is the turning-point which the testator had in view. Nevertheless, the testator has so expressed it as to make it extremely difficult to get over the words, because he has said that the fund shall only be paid and transferred to the son and daughters who shall be then living, or to the children of such of them as shall be then dead, "then" being the death of the survivor of both the husband and wife; and if I were obliged to hold that the necessity of surviving the possible husband and the possible wife applied to the issue as well as to the parents, there would have been extreme difficulty in getting over this unfortunate mode of limitation.

However, adhering, as I do, to the opinion I before expressed of there not being a necessity to survive the tenant for life, as applied to the gift to the children, I have carefully looked at the case which was before Vice-Chancellor *Kindersley* of *Lanphier* v. *Buck*, in which he appears to have analysed most accurately, distinctly, and clearly, the different positions in which the case might be put, with reference to the case of an absolute original gift to children and their issue, and a substitutionary gift to the children or their issue.

In the case to which Mr. *Giffard* referred me of *Crause* v. *Cooper*, I intimated an opinion, although it was not necessary to the decision, that a difference might exist where the limitation over was substitutionary; and that there was strong ground for holding that the same species of limitation which applied to the parent should apply also to the children, namely, that the child should fulfil the condition which the parent was to fulfil, of surviving the period of distribution. But I am quite satisfied, after considering Vice-Chancellor *Kindersley's* very lucid judgment on the subject, that I was in error in throwing out that doubt. I think there is substantially no difference whatever between the expressions "or" and "and," as regards that point, namely, whether or not the

children should be obliged to satisfy the superadded condition of doing that which the parent was to do, namely, survive the tenant for life. Whether the limitation be prefaced by "or" or by "and," I think we must look to the class as being a class upon which there is not imposed the condition which is imposed in the alternative case of the parent.

The form of expression amounts only to this. There is a certain period, the testator says, at which his property is to be divided: at that period let it be given to the parents if they be living, that is one class, or let it be given to all their children, that is another class. He does not say as to the children, if they be living, and I think there are reasons for that distinction. It is not so irrational as has been supposed. I took occasion to make the same observation in the case of *Re Wildman's Trusts*, and I am justified in saying my observation was not unreasonable, because Lord Justice *Turner*, in the case of *Re Pell's Trusts*, spoke of it with approbation. The reason is, that the testator had not the intention of depriving the children of the property on account of their not surviving the tenant for life, although their parent would not take if he or she did not survive the tenant for life. As regards the parent, the testator feels that if the parent lives to take the property, the children, through the parent, will have the benefit of it. If he dies, the testator wishes the children to have the direct benefit of the property; and supposing these children (as is often the case under these limitations) to attain an age when they marry, and are launched in life, the testator has not expressed any opinion adverse to their having the benefit of that property (taking it by way of vested interest or remainder) which they would have derived directly through their parent, if their parent had lived to take it.

But there is another effect of this substitution which Vice-Chancellor *Kindersley* refers to, and which applies to the case before me; and entirely concurring as I do in his view of the case, I cannot do better than use his words. I refer to the position of those children who died in the lifetime of the parent as distinguished from those who died afterwards, in the lifetime of the tenant for life. What the Vice-Chancellor says in his judgment (1) is this: "Then let us see how it will apply to the case, not of an original

(1) 34 L. J. (Ch.) 657.

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gift to issue, but of a gift by way of substitution. Here I see that which prevents the application of those principles; it is a case in which, it not being an original gift to the children of the nephews and nieces, which is the case before me, but first of all to the nephew or niece absolutely, and then, in case the nephew or niece, dies in the lifetime of the tenant for life, substituting the issue for that nephew or niece; there, until the death of the nephew or niece, no substitution takes place, or can take place. The substitution takes place at the death of the nephew or niece. And then I see very good ground for saying there, by reason of its being substitution, you will not substitute dead people for the nephew or niece, who has been living up to that time and has then just died; and I conceive that the true rule upon principle that ought to be applied is this, that if the gift be an original gift to issue, they need not survive the parent; but if it be a gift by substitution, then they must survive the parent in order to be substituted for the parent."

I must say, if I may be permitted to say so, that strikes me as very sound sense, and as a very lucid interpretation of the principle upon which the Court ought to proceed. I hold in this case that the limitation is not void in respect of perpetuity. I hold that all the children who survived their parents participate in this fund, and that those who did not survive their parents do not participate in the fund. Therefore, the declaration will be as asked in the prayer.

Solicitors for the Petitioners: Messrs. *Oliverson & Co.*

Solicitors for the Respondents: Mr. *E. H. Barlee;* Mr. *S. W. Johnson;* Messrs. *Hill & Son.*

In re TARSEY'S TRUST.

Will—Separate use—Sole use.

V.-C. W.
1866
Feb. 24.

Bequest by will of the residue of testator's personal estate to testator's niece (then a widow), "for her own sole use and benefit absolutely," following a bequest of a pecuniary legacy to trustees, upon trust to invest the same and pay the dividends to the same person during her life, "for her own sole and separate use and benefit, free from the control of any husband whom she may marry, and so that her receipt alone may be a sufficient discharge":—

Held, that the circumstances of the testator having in contemplation the marriage of his niece, and having interposed trustees in the former gift to her separate use, distinguished the case from that of *Gilbert* v. *Lewis* (1); and that there was a good gift of the residue to the separate use of the wife.

The word "sole" is an operative word, and must be held to mean "separate," unless it appears from the will that the testator meant it to apply to something other than the marital right of the husband.

THOMAS TARSEY, who died on the 15th of July, 1864, by his will dated the 19th of November, 1847, bequeathed his personal estate to three trustees, their executors, administrators, and assigns, upon trusts for sale and conversion, as soon as conveniently might be after his decease, and to stand possessed of the investments, upon trust, amongst other things, to invest a sum of £2000 sterling in the name or names of his trustees or trustee, or the survivor of them, his executors or administrators, and in the name of his niece, the Petitioner, *Anne Curzon*, widow, in the purchase of stock in some or one of the public funds, or upon other Government or real securities, at interest, of and in England, with power to vary the same, and to stand possessed of the investments and income, upon trust to permit his said niece *Anne Curzon* to receive the dividends and annual income thereof during her natural life, "for her own sole and separate use and benefit, and free from the control of any husband or husbands which she may from time to time intermarry, and so that her receipt alone may be a sufficient discharge for the same;" and after her decease he gave and bequeathed the said stock, funds, and securities in manner therein mentioned.

(1) 1 D. J. & S. 38.

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Testator further gave, devised, and bequeathed the residue of his personal estate unto his niece, the said *Anne Curzon*, "for her own sole use and benefit absolutely."

He also empowered *Anne Curzon*, during her life, to appoint new trustees.

In June, 1856, *Anne Curzon* married *Thomas Mansbridge*, her present husband. No settlement was executed on the occasion of this marriage.

By a deed dated the 24th of November, 1864, *Thomas Mansbridge* made an assignment of all his real and personal estate to trustees for the benefit of his creditors.

This Petition was presented by Mrs. *Mansbridge* by her next friend, praying for a declaration that she was entitled to the residuary personal estate for her separate use, and that the residue, after taxation and payment of costs, might be paid to her, or that after such taxation and payment a proper settlement of the fund might be made upon her.

The respondents to the Petition were the trustees of the trust deed, the trustees of the will, and *Thomas Mansbridge*.

Mr. *F. C. J. Millar*, for the Petitioner:—

No doubt would have been entertained that the words "for her own sole use and benefit absolutely" are sufficient to raise a separate use, but for the *dictum* of Lord *Westbury*, in *Gilbert* v. *Lewis* (1), where the question was not raised in the cause, but was suggested by the Lord Chancellor himself in the course of the argument on the appeal. But this case is distinguishable, for, in *Gilbert* v. *Lewis*, as Lord *Westbury* observes, there were no words of exclusive enjoyment beyond the words "for her sole use and benefit," and there was no interposed machinery of trustees. Here there were to be found a clear contemplation by the testator of his niece's marriage, a former gift of a legacy expressly to the separate use, and in that former gift, the interposition of trustees.

In *Adamson* v. *Armitage* (2), the gift was to a single woman "for her sole use and benefit." This was held to vest the estate in the legatee, to the exclusion of the husband's right. In ——

(1) 1 D. J. & S. 38. (2) 19 Ves. 416; Coop. G. 283.

v. *Lyne* (1), the bequest was for "the sole use and benefit" of the testator's widow, and the result was the same.

In *Ex parte Ray* (2), Sir *T. Plumer* says: "Taking the words 'sole use' by themselves, they must have the same meaning as 'separate use;' omitting the word *sole*, the property would go to the husband; but I am not at liberty to reject that word. 'Sole' means solely hers—for her sole benefit. It is an emphatic and operative word."

[They also cited *Inglefield* v. *Coghlan* (3); *Prichard* v. *Ames* (4); *Davis* v. *Prout* (5); *Lee* v. *Prieaux* (6).]

Mr. *Speed*, for the trustees of the creditors' deed:—

That the marital right is not excluded by these words is shewn by *Gilbert* v. *Lewis*, which is the latest authority.

But independently of that case, in *Tyler* v. *Lake* (7), Lord Chancellor *Brougham* says that the husband is not to be deprived of his legal right, unless there appears a clear intention that he is to be excluded.

Ex parte Ray was a case of a settlement, which furnishes no authority for the construction of a gift by will. There the words were for the "own sole use, benefit, and disposition" of a lady who was about to marry.

In *Inglefield* v. *Coghlan* the gift was to a married woman, "solely and entirely for her own use and benefit during her life." Here the gift is to a single woman. [The VICE-CHANCELLOR:—But the testator contemplates her marriage.] The words in *Prichard* v. *Ames* were, "for her own use, and at her own disposal;" and that, also, was a gift to a married woman.

The case of *Davis* v. *Prout* has no relation to the present. The gift there was "for the sole and absolute use" of a female infant. The testator died; the infant married the Plaintiff, and a settlement was made. Then a suit having been instituted by the wife, after she came of age, against the trustees, the husband joined as co-Plaintiff. The Defendants objected to the misjoinder, because they said the estate was the separate estate of the wife,

(1) 1 You. 562.
(2) 1 Madd. 199, 207.
(3) 2 Coll. 247.
(4) T. & R. 222.
(5) 7 Beav. 288.
(6) 3 Bro. C. C. 381.
(7) 2 Russ. & My. 183, 188.

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and the Court allowed the objection. That is not a distinct authority.

The case of *Lee* v. *Prieaux* is very different. That was a legacy to a married woman, "her receipt to be a sufficient discharge to the executors."

Mr. *Ince* for the trustees of the will.

SIR W. PAGE WOOD, V.C.:—

This case is not free from difficulty; a great portion of the doubt arising from the reasons which are stated by Lord *Westbury* in the case which has been cited.

It struck me from the first that there was a peculiarity in this case arising from this: that in a former part of the will there is a direction that the sum of 2000*l.* should be invested in the names of trustees upon trust for the Petitioner for life, for her own sole and separate use. But after that legacy comes the bequest of all the residue of the testator's personal estate to the same lady, "for her own sole use and benefit absolutely;" and in that state of things, the circumstances that this lady was unmarried at the time of the bequest, and that there is here no intervention of trustees as in the former gift, certainly render it a matter of some question how far the word "sole" is adequate to exclude the marital right.

The conclusion which was arrived at in the case of *Gilbert* v. *Lewis*, before Lord *Westbury*, would of course tend to increase that doubt, although it was extra-judicial, and not necessary to the determination of the case. But the fact of the lady being unmarried, which at first sight would appear unfavourable to the creation of the separate use, turns out to be favourable to it, as rebutting the difficulty which occurred to Lord *Westbury*, because here the testator evidently contemplated the marriage of his niece. He therefore contemplated the exclusion of the marital right.

As to the legacy of 2000*l.*, he gives it to trustees. His niece is to receive the dividend for her life, "for her own sole and separate use and benefit, and free from the control of any husband or husbands with whom she may, from time to time, intermarry; and so that her receipt alone may be a sufficient discharge for the

same;" and from and after her decease the testator gives the fund to certain other persons whom he names. Then, as to the residue, the testator devises and bequeaths all the residue of his personal estate, subject to the payment of his debts, at once and absolutely to the same niece, in these words,—"for her own sole use and benefit absolutely." The testator uses this word "absolutely" to distinguish the whole interest, as contrasted with the life interest which he had given previously. As regards the latter gift, he has not made any one partaker with his niece by disposing of the life interest to another, but he gives her the residue absolutely, expressing a distinction in this instance besides, that it was to be "for her own sole use and benefit."

In the case of *Massey* v. *Parker* (1) the question arose upon the use of the word "sole," and Lord *Cottenham* (then Sir *C. Pepys*, M.R.) commenting upon the use of that word, finds that where it occurs, it does not necessarily exclude the husband's right. After stating the case, Lord *Cottenham* says:—

"The cases require very distinct and unequivocal expressions to create a separate interest in the wife. In *Tyler* v. *Lake* (2), the Lord Chancellor says that the husband is not to be excluded except by words which leave no doubt of the intention; and of the principle, that case of *Tyler* v. *Lake*, which is also reported before the Vice-Chancellor (3), and the case of *Stanton* v. *Hall* (4), afford strong illustration. In neither of these cases did the claim of the wife prevail; although in *Stanton* v. *Hall* the whole machinery of the instrument proved that such must have been the intention, but the required words of exclusion were wanting; and in *Tyler* v. *Lake*, the trustees were directed to pay the shares of the trust fund into the proper hands of the married women, to and for their own use and benefit; and if they should be dead, to pay the same to their husbands. Such being the rule, is there in this case no doubt of the intention to exclude the husband? The true construction is quite the other way. There is no mention of the husband, nor any direct allusion to marriage. There is, indeed, a gift to the children of her grandchildren, but there is nothing to shew that the testatrix had present to her mind the right

(1) 2 My. & K. 174, 181.
(2) 2 Russ. & My. 183.
(3) 4 Sim. 144.
(4) 2 Russ. & My. 175.

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which future husbands of her grandchildren would obtain in their property. It is immaterial to consider what effect the words might have had if used with reference to future husbands of her grandchildren, because I am of opinion that they are in this case used with reference, not to any control of such future husbands of the grandchildren, but to the possible control of their mother."

As regards that case of *Hartley* v. *Hurle* (1), which was overruled in *Tyler* v. *Lake*, it may be observed that even in that case there was a pretty strong indication of the intention of the testator.

And where no meaning can be given to the word "sole," except that the estate shall be held separately from the husband, I think that, following the case of *Inglefield* v. *Coghlan* (2), I ought not to depart from that rule of construction, unless I find, as in *Massey* v. *Parker*, that the word sole was plainly used by the testator with a different meaning.

I have not here, as in the case before Lord *Westbury*, merely a gift to an unmarried woman without any intervention of trustees, but I have a gift to a person the marriage of whom the testator contemplates, as is shewn by the interposition of the machinery of trustees in the former gift.

I think, therefore, I cannot treat the word "sole," when it is applied to the contemplated case of the marriage of a single woman, as connected with anything else than her marriage.

The Petitioner, therefore, must have the money paid to her in the terms of the prayer; the costs of the Petitioner and Respondents, and the costs, charges, and expenses of the trustees, to come out of the fund in Court.

Solicitor for the Petitioner: Mr. *W. R. Buchanan.*

Solicitors for the Respondents: Messrs. *Wild & Barber;* Messrs. *Russell & Davis.*

(1) 5 Ves. 545. (2) 2 Coll. 247.

HOMFRAY *v.* FOTHERGILL.

V.-C. S.
1866
Jan. 27, 29;
Feb. 9.

Partnership—Specific Performance—Pre-emption.

Partnership articles provided that no partner should sell his shares except as follows:—That the partner desirous of selling should offer the shares to his co-partners collectively; if they should decline, then to the partners desirous of collectively purchasing; and if none such, then to the partners individually; after which he might sell to a stranger.

One of four partners offered his shares to the other three collectively (one of whom to his knowledge would not purchase). The remaining two declared their willingness to accept, and were told that no offer was made to them:—

Held, that the offer to the three enured for the benefit of the two, and specific performance decreed accordingly.

THE Plaintiffs, Messrs. *Homfray*, were two of the partners in the *Tredegar Iron Works*, and the Defendants, *Fothergill* and *Forman*, the remaining two partners.

The partnership was established in 1800, and consisted of twenty-four shares, of which ten and a half shares were now held by the Defendant *Forman*, five and a half by the Defendant *Fothergill*, four by the Plaintiff *S. Homfray*, and the remaining four shares by the Plaintiff *W. Homfray*, as trustee for himself and his brothers.

The partnership deed, which was executed in 1816, and now regulated the rights of the present partners so far as was material to the present question, provided as follows:—

That no partner should sell one or more share or shares in the company but under the regulations and restrictions next thereinafter mentioned, viz., that whenever any partner should be desirous of selling one or more share or shares held by him or her in the said concern he or she should leave at the place of abode of the other partners notice in writing of such his or her intention at least two calendar months before the then next ensuing annual meeting, and should at such annual meeting next after such notice offer such share or shares as she or he might be desirous of selling to the other partners collectively, to be held, if purchased, in the same proportion as the said partners were for the time being

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entitled to the said joint capital; and if all the said partners should collectively decline to purchase, then he or she so desirous of selling should offer such share or shares to be sold to the said partners desirous of collectively purchasing, if any, and if no two partners should be desirous to purchase jointly, then the partner or partners desirous to sell should offer such share or shares so to be disposed of to any individual partner as he or she might think proper; and if the said partners should individually decline to purchase, the partner desirous of selling should then, and not before, be at liberty to sell his or her share or shares, so to be sold, to any person or persons not a partner or partners in the said concern, provided he or she sold the same fairly and *bonâ fide* for £500 per share at the least more than the price at which he or she offered the same to his or her partners collectively and individually, but not otherwise, without the consent of all the other partners in writing.

In 1864, certain negotiations having been opened by the Defendants for the sale of these shares to strangers, it was agreed by all the partners to vary the provisions of the deed as follows:—

"That as the articles of partnership require a notice to be given upon the sale of any shares in the concern, it is agreed by the respective partners to waive the notices, and, if it is necessary, to sign any legal paper confirming their assent when required."

Negotiations were shortly afterwards opened between the Plaintiffs and Defendants for the purchase of Defendants' shares, but they went off chiefly because the parties could not agree upon a stipulation as to the use of a railway called the *Sirhowy* railway, in which the partners had a large interest. The Plaintiffs' solicitor then verbally informed the Defendants that the resolution as to the waiver of notices was no longer binding. On the 20th of March, 1865, the Defendants wrote to the Plaintiffs offering to sell their shares at £16,375 per share, provided the railway should be used. The letter also stated that, as the articles of partnership, as modified, no longer required notice, the Defendants requested a definite answer within a fortnight. The letter concluded as follows:—

"If we hear nothing from you to the contrary within that period, we shall assume that you decline the offer, and shall con-

sider ourselves at liberty to sell our shares to any other party without further notice.

"We are yours,

"W. H. FORMAN.

"ROWD. FOTHERGILL."

In reply to this letter, the Plaintiffs wrote to Messrs. *Forman* and *Fothergill* stating that they considered the offer not an offer according to the deed, that no sale could be made, subject to such stipulations, and declined the offer; but they offered (without prejudice) to purchase *Fothergill's* five and a half shares without the condition to use the railway at £16,375 per share, and if that offer were accepted, to allow *Forman's* ten and a half shares to be sold to strangers without previous offer to the partners, so that the sale was completed within six months. They intimated that if any sale to strangers should be attempted, either with or without the condition, they would take proceedings to prevent it.

One of the usual half-yearly meetings of the partners at the works was summoned for the 17th of May, 1865, and on the 12th of May the Plaintiffs received from *Forman* the following letter:—

"*London,* 11th May, 1865.

"*Rowland Fothergill,* Esq.,

"*Samuel Homfray,* Esq.,

"Rev. *Watkin Homfray.*

"DEAR SIRS,—I beg to inform you that I am desirous of selling the ten and a half shares at present held by me in the *Tredegar Iron Company,* and that it is my intention to offer them at our next meeting at the works, on the 17th instant, to you as my partners in the concern, in accordance with the articles of partnership, at the price of £16,375 per share.

"I beg to add that I give you this intimation of my desire and intention with reference to my shares that my offer to sell them may not take any of you by surprise, but without prejudice to the resolution and agreement passed and entered into between us in March, 1864, and without acknowledging that I am under any obligation to give you any notice or intimation of my desire or intention to sell.

"Yours truly,

"W. H. FORMAN.

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A duplicate of this letter was sent by *Forman* to *Fothergill*, and on the 13th of May *Fothergill* sent the following letter to the Plaintiffs:—

"*Hensol Castle*, 12th May, 1865.

"DEAR SIRS,—Although after the resolution of the 2nd of March, 1864, no previous notice is necessary, I beg, out of courtesy to you, but without prejudice to that resolution, to give you notice that it is my intention to offer you, as my partners in the *Tredegar Iron Works*, according to the terms of our articles of partnership, the five and a half shares which I hold therein, and which I am desirous of selling at our next meeting to be held at the works on the 17th instant. I propose to offer them at the rate of £16,375 per share.

"I am, &c.,

"ROWD. FOTHERGILL."

A duplicate of this letter was sent by *Fothergill* to *Forman*.

On the 17th of May, 1865, a meeting of the partners was held at the works, and after the conclusion of the business *Forman* offered his ten and a half shares in the works to the partners, *Fothergill* and the Plaintiffs, on the terms contained in the letter of the 12th of May, 1865. The Plaintiffs expressed their willingness to purchase them, but *Fothergill* declined to purchase them collectively with the Plaintiffs. The Plaintiffs then said they were willing to purchase the shares jointly, to which *Forman* replied, "I make no offer to you."

A meeting took place on the 7th of June between the Plaintiffs and Defendants, at which a proposal was considered for the admission of a Mr. *Pilditch* into the partnership by purchase of the Defendants' shares, or some of them. The negotiations failed, because, as the Plaintiffs alleged, the Defendants insisted on the condition that the *Sirhowy* railway should be used. Some further negotiation stook place, but ultimately the Plaintiffs filed this bill alleging that *Fothergill* at the last-mentioned meeting went on to threaten that the Defendants would sell their shares to other parties without offering them to the Plaintiffs; and that the Defendants had actually entered into a negotiation with *Pilditch*, or some other persons, to sell their shares, and "all through the said transaction had been, and now were, acting in concert, and

combining together with a view to evade the provision in the deed of co-partnership as to the sale of shares by partners to the other partners in preference to persons not partners, and contrary to the deed to sell these shares to strangers without giving the Plaintiffs the option of purchasing, which they were willing to do, and also to bind the company to use the *Sirhowy* railway."

The bill prayed, 1. That *Fothergill* might be restrained from selling his shares to any persons until he should have offered them to the Plaintiffs, under the partnership articles, and they had declined to purchase them; and that *Forman* might be restrained from selling his shares to any persons other than the Plaintiffs. 2. That it might be declared that the Plaintiffs were on the 17th of May, 1865, entitled to exercise the option of purchasing *Forman's* ten and a half shares at £16,375 per share; and, 3. That if necessary, the true construction of the deed might be declared, and that it might be declared that the provisions respecting the sale of their shares by partners to their co-partners had not been varied.

Both Defendants by their answer denied that any intention existed, or had been expressed, of violating the provisions of the partnership deed, and alleged that the reason why *Forman* declined to offer his shares to the Plaintiffs was, that the Plaintiffs had not the means of effecting the purchase.

There was a great deal of evidence, but there was not much conflict as to the facts.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Bacon*, Q.C., and Mr. *Darby*, for the Plaintiffs, relied on the construction of the deed as entitling the Plaintiffs to accept the offer made to the three partners collectively, and refused by *Fothergill*. They also relied on the evidence which they contended shewed that the two Defendants were acting in concert to evade the provisions of the deed, in order to sell their shares to strangers, so as to extort terms as to the user of the *Sirhowy* railway. They contended further that the evidence proved that the Defendants had been attempting to sell their shares in violation of the partnership articles. They were stopped by the Court.

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HOMFRAY v. FOTHERGILL.

Mr. *Rolt*, Q.C., Mr. *W. Collins*, Q.C., and Mr. *Bedwell*, for the Defendants:—

As a matter of fact, neither of the Defendants ever contemplated doing anything in contravention of the partnership articles. No injunction therefore is required or will be granted by the Court. The bill in substance seeks an injunction against *Fothergill*, and specific performance of an alleged agreement against *Forman*.

The evidence clearly shews that no intention to sell to strangers ever existed on the part of either of the Defendants.

The case for specific performance depends on the construction of the deed. The words of the clause are these, that "if one partner shall be desirous of selling," he shall offer them, &c., &c., but it was admitted by the Plaintiffs themselves that *Forman* never was desirous of offering his shares to the two partners. It was clear, therefore, that there never could have been any agreement, as all the parties never had a consenting mind.

In this case, the strict terms of the notice did not amount to an offer to the Plaintiffs consenting, but even supposing they did, if it was clear that one of the parties had not intended to enter into any agreement, this Court would not interpose to decree specific performance, which was always discretionary. In such a case it would leave the Plaintiffs to their remedy at law. But in fact there was no agreement at all, and it was admitted there was none in writing.

[The VICE-CHANCELLOR:—You do not plead the statute.]

Mr. *Rolt*:—That is immaterial if the agreement is denied: *Ridgway* v. *Wharton* (1).

[The VICE-CHANCELLOR:—That case is no authority on the statute].

Mr. *Rolt*:—The Plaintiffs are bound to prove an agreement in writing, which they have not proved, and could not prove, because no such document exists. They are obliged to rely on the notice. On the whole case it is submitted the bill must be dismissed with costs.

(1) 3 D. M. & G. 677; see S. C. 6 H. L. C. 238.

Feb. 9. SIR JOHN STUART, V.C.:—

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This suit is instituted to obtain the assistance of the Court to restrain an alleged violation of an important clause in a deed of partnership. The construction of this clause, as applied to the acts and conduct of the parties, is very difficult, and the duty of the Court is to construe it with a proper regard to the rights and benefits which it gives to each and all of the contracting parties.

In cases of private partnership composed of a few individuals, as distinguished from joint-stock companies, clauses relating to a partial dissolution by a sale or transfer of shares are of vital importance. The introduction of any stranger to whom the caprice of one partner may sell and transfer his share, might not only produce disagreeable consequences by a compulsory association with a stranger, but might disconcert and perhaps destroy a successful business.

To the retiring partner, who wishes to sell his shares, the principal, if not the only, matter of importance is the price which he is to obtain. But if, by contract, the continuing partners have a right of pre-emption, the great value and importance of that right must be recognised, and this Court will restrain by injunction the violation of it, and will, in a proper case, enforce its performance by decree.

For the Defendants, the question in this case has been argued as if the jurisdiction of this Court to enforce the performance of such a clause was as much a discretionary jurisdiction as the performance of an ordinary contract between vendor and purchaser.

That cannot be a correct view, because the rights of the parties under a clause of pre-emption in partnership articles is not, generally speaking, the subject of cognisance in a Court of law. This Court cannot say, as in the ordinary contract between vendor and purchaser, that it will leave the parties to their legal remedy.

Nor can this Court say, where there is a right of pre-emption, that the person desirous of selling may choose to which of his partners he will offer to sell, and that he may choose to exclude some from the offer unless on the true construction of the clause such a choice is clearly given. Exclusion of all choice to the

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vendor, and an absolute right to the continuing partners is the great object of such a clause. As soon as the character of vendor is assumed, the right of pre-emption is an absolute right, excluding choice by the vendor.

How far there may be a right to retract an offer before acceptance, and to what extent the *locus penitentiæ* may be permitted, must depend on a fair consideration of the terms of the clauses and the conduct of the parties.

Where, as is usual, and as occurs in this case, a preliminary notice is necessary, and a day is fixed when the offer is to be accepted or rejected, if a question arise whether the offer might be retracted at any time between the notice and the day fixed for acceptance or rejection, although on the first impression there might seem to be a right to retract, still that may be modified by acts fairly done by the continuing partners on the faith of and in reliance on the *bona fides* of the notice.

In the present case no difficulty arises on the question of notice. Both Plaintiffs and Defendants admit the sufficiency of the notice. The question which occurs on the pleadings as to the waiver of the notice seems not of much importance. If it was necessary to decide it, there would be difficulty in holding that there was a permanent and complete waiver of that notice which is required by the deed. As to the offer, the clause seems compulsory in its terms. On an offer being made, first to all the other partners collectively, if that offer be declined the language of the clause is clear and positive that there shall be an offer to the other partners desirous of collectively purchasing. As to this second offer, the language might have been such as to leave it to the will and discretion of the vendor, whether he should go on to make any further offer than the first offer. There might have been the words "may if he shall think fit," or other words giving an option, not to go further than the first offer. But the words of this clause are so clear as to exclude any such option. The words are, "And if all the said partners shall collectively decline to purchase, *then* he or she so desirous of selling shall offer such share or shares to be sold to the said *partners desirous of collectively purchasing if any.*"

This language is clear and peremptory. After the first offer the

other partners desirous of purchasing collectively are persons whose desire to purchase is protected by imperative words requiring that the shares shall be offered to them. If this right is conferred upon them by the words of the contract the Court has no warrant for refusing to enforce it, and no warrant for giving to the person desirous of selling an option or a power to retract the rights conferred by a clause which he has advisedly and upon notice brought into operation. The right arises and comes into active operation as soon as the notice is given. There is a great difference between a clause framed so as to make the second offer compulsory and a clause which should give to the person desirous of selling an option to stop after the first offer. The notice of the offer is required in order to give time for consideration and preparation. So large a sum as the purchase-money in this case probably requires efforts, and perhaps expenses and collateral arrangements, which, when once made for the acceptance of the offer, might render the exercise at the last moment of an option to stop at the first offer an intolerable hardship. This was probably the reason for the clear and positive language of the clause, that after the first offer to sell there shall then be an offer to the other partners desirous of purchasing. The notice is in fact the offer, and the day named for the formal offer is only named for the purpose of fixing the last moment for acceptance. Unless then accepted the vendor's right of selling to a stranger comes into immediate operation.

The conduct of the Defendants shews the importance of having had the clause so framed as to give the Plaintiffs the right to have and accept the next offer.

A benefit so important as the right of pre-emption which is secured by this clause is not to be taken away by any illusory proceeding, or by evading the language of the contract. But the struggle of the Defendants is in fact to evade the operation of the clause. Before the notice of the 11th of May, 1865, there had been on four occasions negotiations by the Defendants for the sale of their shares. When the offer of the 11th of May, 1865, was sent to the Plaintiffs, it was a matter of certainty that the Defendant *Fothergill* did not intend to purchase, and, therefore, that the only offer which the Defendant *Forman* could make in good faith

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was an offer to sell to the Plaintiffs. Accordingly, the notice contains no limitation or reservation. It contains no intimation confining it to all the other partners collectively, to the exclusion of the two Plaintiffs collectively. It was well known that *Fothergill* would not purchase, and that an offer which included him must be refused. Nevertheless, the Defendant *Forman* might have worded his notice so as to restrict the offer to the others, including *Fothergill*, and might have stated that there was no offer to the Plaintiffs collectively unless in conjunction with *Fothergill*. But the notice of the offer not being so expressed, and being read as an offer in compliance with the clause, no honest interpretation can be put upon it other than that it was an offer to the Plaintiffs.

Moreover, the language of the notice of the 11th of May, 1865, is such that, unless the Plaintiffs had insisted on accepting, and if they had been silent at the meeting, the Defendant *Forman* would have been entitled to sell to a stranger.

According to the Defendant's construction, the notice and the meeting were for a purpose illusory and absurd. But if the notice is to be construed according to the imperative language of the clause, and the Plaintiffs, believing that the Defendants were acting in good faith, came to the meeting to accept an offer which the Defendants had given them notice would be made, and at the meeting stated their acceptance of the offer which the Defendants were bound to make, their right to compel the Defendants to sell to them must be complete, unless the Court is authorized to construe words which are imperative as giving an option which it is the object of the clause to exclude.

Looking at the answer of the Defendants, and the evidence, it is plain that they have two objects in view: one is to sell to a stranger, the other is to evade the Plaintiffs' positive right of pre-emption. The meeting of the 17th of May, 1865, at which they set up the pretence of refusing to make any offer to the Plaintiffs, was immediately followed by an attempt to persuade the Plaintiffs to consent to a sale to a stranger. According to the Defendants' own statement of their case, the only reason for refusing to the Plaintiffs their right of pre-emption is that they have not money to complete the purchase. But as this is a matter easily brought to the test, and the Defendants refuse to bring

it to the test, it bears the appearance of a mere pretext. The right to limit a time for payment of the purchase-money affords a sufficient protection. To refuse to give to the Plaintiffs that to which they have a right, on the pretext that they are not able to exercise the right, and at the same time to refuse to employ the obvious means of putting the alleged inability to the test, is an injustice which this Court ought not to permit.

No question arises as to the price, for it has been fixed by the Defendant *Forman* himself. It seems unnecessary to consider the attempt of the Defendants to embarrass the Plaintiffs in their right to the specific performance of the contract for pre-emption by the repeated proposal to impose a condition as to the use of the *Sirhowy* railway.

In the 27th and 35th paragraphs of the answer the account which the Defendants give of their conduct and motives manifests a settled disposition to deprive the Plaintiffs of the benefit of pre-emption. Therefore, unless the clear and positive words of the clause, unqualified as they are, can be read as giving to the Defendants an option and a discretion which seems to have been carefully and intentionally excluded, the Court is bound to protect and enforce by its decree the Plaintiffs' right of pre-emption. For this purpose there must be a declaration that, according to the true construction of the clause of pre-emption in the pleadings mentioned, and having regard to the notice of the Defendant *Forman*, of the 11th of May, 1865, and the proceedings at the meeting on the 17th of May, 1865, the Plaintiffs are entitled to be considered and declared the purchasers of the shares of the Defendant *Forman* as from the 17th of May, 1865, at the price of £16,375 per share, and decree the same accordingly.

Solicitors for the Plaintiffs: Messrs. *Hooke & Street.*
Solicitors for the Defendants: Messrs. *Oliverson, Peachy, & Co.*

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1866
Feb. 12.

DUDDELL *v.* SIMPSON

Specific Performance—Right to rescind.

A clause authorizing the vendor to rescind the contract for sale in case the purchaser should insist on any requisition which the vendor should be unable or unwilling to comply with :—

Held, not to justify a notice to rescind where the purchaser, after finding that the vendor was unable or unwilling, waived the requisition.

THIS was a bill for specific performance.

On the 12th of July, 1864, a property called *Drayton Villa, Thistle Grove, Brompton*, was offered for sale by public auction, on behalf of the Defendant, and knocked down to the Plaintiff at the sum of £2700. Another property called *Foley Villa*, was also purchased by the Plaintiff at the same time in a separate lot, as to which no question was raised by the Defendant.

The Defendant was mortgagee, and sold under his power of sale. The particulars of sale, so far as were material to the present question, were as follows :—

"The tenure of the property is freehold, with the exception of that portion lying to the south and having a frontage of sixty feet facing *Thistle Grove*, by a depth of 108 feet, and which portion is held for an unexpired term of twenty-four years from the 29th of September next, at a nominal rent of £10 10*s.* per annum."

The 4th condition of sale provided that "if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale nor shall any compensation be allowed by the vendor in respect thereof." The 13th condition provided "that if the purchaser shall insist on any objection or requisition as to the title or abstract, or evidence of title, particular, conditions, conveyances or otherwise which the vendor shall be unable or unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser or his solicitor at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, cost

of investigating the title, or other compensation or payment whatever."

The Plaintiff was declared the purchaser, paid £540 deposit, and signed the printed agreement prepared by the auctioneer in the ordinary form.

Part of *Drayton Villa* was freehold, but the piece of land mentioned in the particulars was held for a term of twenty-four years, less *three days*, which were vested in one *Smart* as trustee of the marriage settlement of a Mr. and Mrs. *Clark*.

The Plaintiff's solicitors on the 25th of July, 1864, sent to the Defendant the requisitions of title of which number 12 was as follows:—

"The particulars describe the leasehold part of *Drayton Villa* as held for the term of twenty-four years under the lease of March 21, but the vendor has only an under-lease for the time, less three days. The vendor must procure an assignment of the reversion of three days. Who can make this assignment?"

The vendor's solicitors assented to this requisition, and approved of the draft conveyance on behalf of the *cestui que trust* of the settlement. In February, 1865, the Plaintiff filed his original bill asking for specific performance of the agreement. In April, 1865, the Defendant's solicitors wrote to the Plaintiff's solicitors stating that the Defendant was unable to comply with the 12th requisition, and on the 27th of that month they sent to the Plaintiff's solicitors the following notice:—

"*To George Duddell, Esq., and Messrs. Brooks & Du Bois, his "Solicitors.*

"As you insist on your objection number 12 to the title or conveyance of *Drayton Villa* (stating it), and as I am unable to remove or comply with such objection or requisition, I do by this notice in writing, pursuant to the 13th condition of sale subject to which *Drayton Villa* was sold to the said *George Duddell*, annul the said sale.

"Dated the 26th day of April, 1865.

(Signed), "T. B. SIMPSON.

"Witness, J. C. POWELL, 7, *New Inn, Strand.*"

On the 8th of May the Plaintiff's solicitors wrote in reply, and

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offered to waive the requisition and complete, and to dismiss the bill with costs, to be paid by the Defendant, and, in a subsequent letter of the 27th of May, to dismiss the bill without costs, but this offer was refused.

On the 22nd of June, 1865, the Plaintiff amended his bill by offering to waive the concurrence of the trustee and *cestui que trust* of the three days.

There was a conflict in the evidence as to whether the Plaintiff or his solicitors insisted on the concurrence of the trustee and *cestui que trust* after being informed that the Defendant was unable to procure it, but His Honour decided this issue of fact in favour of the Plaintiff.

Mr. *Malins*, Q.C., and Mr. *Amyot*, for the Plaintiff, relied on the agreement. It was clear from the evidence that the moment the Plaintiff knew that the Defendant was unable or unwilling to comply with the requisition he gave it up. The Defendant had at first acquiesced in the requisition or the Plaintiff would have waived it before the filing of the original bill. They cited *Hoy* v. *Smythies* (1).

The VICE-CHANCELLOR:—The burden lies on the Defendant to shew that he was entitled to rescind the contract without giving the Plaintiff the opportunity of withdrawing the requisition.

Mr. *Bacon*, Q.C., and Mr. *Begg*, referred to the evidence and insisted that it shewed that from first to last the Plaintiff had insisted on this requisition. The original bill asked to have the agreement performed specifically and never gave up the objection until the bill was amended, which was after the Defendant had annulled the contract.

SIR JOHN STUART, V.C.:—

In order to bring the clause as to rescinding the agreement into operation, there must be an inability or unwillingness on the part of the vendor and an insisting on the part of the purchaser.

In the present case the inability and unwillingness appeared

(1) 22 Beav. 510: 2 Jur. N.S. 1011

only after the original bill was filed, and the evidence shews that the purchaser never insisted, and from the time that he became aware of the difficulty, he has said all along he was and is now content to accept the title, and has not insisted on what he before required.

In order to establish his defence to this suit the Defendant must shew that the Plaintiff, after he was told that the Defendant was unable or unwilling to comply with the requisition, insisted on the objection. This has not been shewn, and there must therefore be a decree for specific performance and for the costs of the suit.

I think the Plaintiff has shewn enough as to the injury which the Defendant's conduct has occasioned to entitle him to an inquiry what is a proper sum to be awarded for the damages he has sustained.

Solicitors for the Plaintiffs: Messrs. *Brooks & Du Bois.*
Solicitors for the Defendants: Messrs. *Pawle & Lovesy.*

CATON *v.* COLES.

Mesne Profits—Holding over—Statute 6 *Anne*, *c.* 18, *s.* 5.

Where a testator had improperly received the rents and profits of an estate for several years after the death of his wife, who was tenant for life, and before the remainderman asserted his right to possession:—

Held, on demurrer, that the remainderman was entitled to maintain a bill against the legal personal representative for an account of the rents and profits improperly received by the testator, and, if the Defendant did not admit assets, for an account of the testator's estate.

THIS was a general demurrer for want of equity. The allegations of the Bill were as follows:—

By a settlement made on the marriage of *Robert James Harrison* and *Lucy Boddam*, and dated August, 1819, certain real estates were conveyed to trustees upon trusts which were generally for the husband for life, for the intended wife for life, in case she survived him, remainder to the first and other sons, issue of the marriage,

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in tail, remainder to the daughters, equally to be divided, remainder to the use of the husband, his heirs and assigns.

There was no issue of the marriage, and the husband died on the 7th of November, 1841, intestate. The wife, *Lucy Harrison*, on her husband's death, entered into receipt of the rents and profits, and in October, 1844, she married the Reverend *John Coles*, on which occasion a settlement was executed, by which she conveyed her life estate in the said lands to trustees on certain trusts. She died on the 10th of March, 1859. From the date of the marriage her husband received the rents and profits up to the time of *Lucy Coles's* death, and also continued to receive them up to the time of his own death on the 16th of April, 1865. He made his will, dated January 1st, 1865, but having appointed no executor, administration with the will annexed was granted to the Defendant.

The bill alleged that, in the events that happened, the Plaintiffs were entitled to the lands comprised in the settlement of August, 1819, on the death of *Lucy Coles*, formerly *Harrison*.

The 11th and 12th paragraphs of the bill, so far as was material to the question before the Court, were as follows:—

"Shortly after the death of *John Coles*, the Plaintiffs first became aware, as the fact was, that in the events which had happened, they had become seised, to them and their heirs, of the premises comprised in the indenture of August, 1819, and were entitled to all the rents and profits of the said messuages, &c., &c., which had accrued due or become payable since the death of *Lucy Coles*, and caused applications to be made to the Defendant, as representative of *John Coles*, to repay the said rents and profits which had so accrued due, or become payable, and which had wrongfully been received by *John Coles* in his lifetime; but the Defendant has refused to repay the same, or any part thereof, and sometimes alleges that Plaintiffs are not entitled to be repaid out of the assets of *John Coles* the rents, &c., received by the said *John Coles* since the death of the said *Lucy Coles;* but at other times admits that the Plaintiffs are entitled to be paid such rents out of such assets, but pretends he has not assets of *John Coles* sufficient to repay the same. The Plaintiffs insist on the contrary.

"12. The Defendant has now in his possession, custody, or power, the title and other deeds relating to the said lands, and he threatens to demand and receive the rents now due or payable, or which will shortly become due or payable, and the Plaintiffs insist he ought to be restrained by injunction."

The bill prayed for an account of the rents and profits of the said lands due and received since the death of *Lucy Coles* by the said *John Coles;* and that the Defendant might be decreed to pay to the Plaintiffs such amount, and if the Defendant did not admit assets sufficient, that an account might be taken of the real and personal estate of *John Coles:* that the Defendant might be ordered to deliver up the title-deeds: and that the Defendant might be restrained from receiving the rents, and, if necessary, that a receiver might be appointed.

Mr. *W. W. Cooper* (Mr. *Bacon*, Q.C., with him), for the demurrer:—

No bill can be maintained in this Court for *mesne* profits against the executor of the person who held over: *Barnewall* v. *Barnewall* (1). At page 66, Lord Chancellor *Fitzgibbon* lays down the rule thus:—"If the suit for recovery of the possession is properly cognizable in equity, and the Plaintiff should obtain a decree there for possession, the Court would direct an account of rents and profits, but not otherwise." *Hutton* v. *Simpson* (2), and *Vice* v. *Thomas* (3), are to the same effect. The Plaintiff's remedy, if any, is at law, under the statute of 6 Anne, cap. 18, which provides for this precise case (section 5). It was only under this statute that the Plaintiff had any *locus standi*, even at law, where his only remedy lay, because apart from the statute there was no debt.

This bill is really framed as if it sought to recover possession, and as such cannot be sustained: *Loker* v. *Rolle* (4); *Ryves* v. *Ryves* (5); *Armitage* v. *Wadsworth* (6); *Crow* v. *Tyrell* (7); *Davenport* v. *Davenport* (8); *Talbot* v. *Hope Scott* (9); *Vice* v. *Thomas* (10);

(1) 3 Ridg. P. C. 24.
(2) 2 Vern. 722—724.
(3) 4 Y. & C. (Ex.) 538.
(4) 3 Ves. 4.
(5) 3 Ves. 343.
(6) 1 Mad. 189.
(7) 3 Mad. 179.
(8) 7 Hare, 217.
(9) 4 K & J. 96.
(10) 4 Y. & C. (Ex.) 538.

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Jones v. *Jones* (1); *Crowther* v. *Crowther* (2). As a matter of fact, the Plaintiffs have possession both of the real estate and of the title deeds, though even if they had not, this ejectment bill cannot be maintained.

Lastly, the Defendant demurred, *ore tenus*, on the ground that the usual affidavit was not annexed, shewing that the Plaintiff had not the deeds in his possession: *Anonymous* (3); *Whitchurch* v. *Golding* (4).

Mr. *Malins*, Q.C., and Mr. *Elliot Forster*, for the Plaintiffs, were not called on.

SIR JOHN STUART, V.C.:—

The Plaintiff is certainly a creditor of the testator in respect of the rents which he improperly received, and is entitled to recover from his estate the amount which may be found due on taking the account.

It has been argued in support of the demurrer, that this is an ejectment bill; but in its frame it is more in the nature of a creditor's bill seeking payment of a debt, by bill against the legal personal representative.

The cases cited do not appear to me to apply to this case; *Barnewall* v. *Barnewall* (5) has been cited, but that case proceeded on the fact that the bill was filed after a judgment had been obtained in ejectment. In *Loker* v. *Rolle* (6) a demurrer was allowed on the ground that the Plaintiff ought to have filed a declaration in ejectment. The other cases are equally inapplicable.

It has been contended, also, that the demurrer ought to be allowed, because the scope of this bill would embrace the title-deeds of the estate, and that there ought to be, therefore, an affidavit to shew that the deeds are not in the Plaintiffs' possession. But this is not a bill of discovery, and that argument cannot be sustained.

The demurrer, therefore, must be overruled in the usual way.

Solicitors for the Plaintiffs: Messrs. *Emmet & Co.*
Solicitor for the Defendant: Mr. *Dennis.*

(1) 3 Mer. 161, 170, 171.
(2) 23 Beav. 305.
(3) 3 Atk. 17.
(4) 2 P. Wms. 541.
(5) 3 Ridg. P. C. 24.
(6) 3 Ves. 4.

HOARE *v.* OSBORNE.

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1866
Feb. 16, 17

43 Eliz. c. 4—Charitable bequest—Window in church—Monument in church—Vault in churchyard—Chancel—Repairs.

A testatrix bequeathed £600 to trustees upon trust to empower the minister and churchwardens of the parish of *H.* to receive the dividends and apply them in keeping in good repair, order, and condition for ever, the monument of her mother in *H.* church, the vault in *H.* aforesaid, in which she was interred, and an ornamental window which she directed her trustees to place in the church of *H.* in memory of her mother, and to apply any surplus of such dividends towards keeping in repair and ornamenting the chancel of the said church:—

Held, that the gift for the repair of the vault (which was in the churchyard) was not a charitable gift, and fell into the residue; but that the gift for the other purposes was a good charitable bequest; and the Court, being of opinion that it would be impossible to ascertain by inquiry what portion of the fund should be attributed to each purpose, divided the fund equally as between the several purposes.

AMELIA FREEMAN, by will dated in 1855, made the following bequest, "as a further memorial of my affection for my late dear mother, I desire that an ornamental painted window may be placed in *Hungarton Church*, the design and cost thereof to be at the discretion of my said trustees or trustee. I also direct that my said trustees or trustee for the time being shall invest the sum of £600 in the purchase of £3 per cent. Consolidated Annuities in their or his names or name upon trust, to authorize and empower the minister and churchwardens for the time being of the parish of *Hungarton* aforesaid, to receive the dividends thereon from time to time, to apply the same in keeping in good repair, order, and condition for ever the monument of my dear mother in *Hungarton Church*, the vault in *Hungarton* aforesaid in which she is interred, and the said ornamental painted window; and if any surplus of such dividends shall at any time remain, to apply the same towards keeping in repair and ornamenting the chancel of the said church."

A suit having been instituted for the administration of the testatrix's estate, £600, representing the gift, had been carried to

V.-C. K. 1866 HOARE v. OSBORNE.

a separate account, and the trustees now presented a Petition for payment out to the parties entitled, and upon this Petition the present questions arose.

The window had, with the sanction of the Court, been placed in *Hungarton Church* as directed by the testatrix.

It was admitted that the vault was in *Hungarton Churchyard*, and not in the church. There was no evidence as to the nature of the monument in the church, or in what part of the church the window was situate.

Mr. *Toller*, Q.C., and Mr. *Chapman Barber*, for the trustees, stated the Petition to the Court.

Mr. *Schomberg*, for two residuary legatees, submitted that the gift was altogether void as not being a charity, and tending to perpetuity: *Rickard* v. *Robson* (1); *Fowler* v. *Fowler* (2). If any one of the objects of the gift was void, the remainder was void for uncertainty.

Mr. *Bazalgette*, Q.C., and Mr. *Charles Hall*, for the testatrix's husband, who had a life interest in the residue, took the same line of argument, and referred to *Lloyd* v. *Lloyd* (3).

Mr. *W. Pearson*, for the lay impropriator:—

The gift is altogether good, or, at all events, as to parts. The cases cited on the other side shew only that a gift for the perpetual repair of tombs or graves in a churchyard is not good.

The gift for keeping in repair the window is good as a charity, the window being part of the church, and a gift for the repair of the church being within the statute of *Elizabeth* (4).

The gift for the repair of the monument in the church is good for the same reason. It is a part of the ornaments of the church, which it is the duty of the churchwardens to keep in repair (5). In *Turner* v. *Ogden* (6), a gift for the repair of chimes; in *Attorney-General* v. *Oakaver* (7), a gift to keep up a gallery; and in *Attorney-General* v. *Ruper* (8), a gift to adorn the church, were severally

(1) 31 Beav. 244.
(2) 33 Beav. 616.
(3) 2 Sim. 258.
(4) 43 Eliz. c. 4.
(5) 1 Burn's Ecc. Law, 357.
(6) 1 Cox, 316.
(7) Cited, 1 Ves. Sen. 536.
(8) 2 P. Wms. 126.

held good: and there is no reason why a gift to repair the monument in the church should not be equally good.

With regard to the gift for the repair of the vault in the churchyard. The soundness of the cases cited on the other side has been questioned: *Tudor's* Charitable Trusts (1). *Lloyd* v. *Lloyd* was a case of realty; and it does not appear that the point was argued in *Rickard* v. *Robson;* and in *Doe dem Thompson* v. *Pitcher* (2), a gift for the repair of tombs was held good.

The gift to repair the chancel is good; it is the duty of the churchwardens to keep it in repair, though it is true the lay impropriator is liable if it be not kept in repair (3); but, in addition to repair, the gift here is to "ornament" as well, and it is a good charity.

If some one or more of the objects be good and the rest bad, the Court will, by inquiry, find out what proportion of the fund is to be attributed to each object, or, if that is not possible, it will divide the fund equally between the different objects: *Attorney-General* v. *Doyley* (4); *Brown* v. *Higgs* (5); *Adnam* v. *Cole* (6); *Salusbury* v. *Denton* (7); *Mitford* v. *Reynolds* (8); *Chapman* v. *Brown* (9). He also referred to *Cramp* v. *Playfoot* (10), and *Thomson* v. *Shakespear* (11).

Mr. *Schomberg*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

The cases which have been cited clearly determine that a gift of a sum of money for the repair of a grave or tomb without reference to the distinction whether in a church or not, is void, not being a charity; and those decisions I must follow.

The question I have to determine is, whether the several objects of this gift are charitable. If they are charitable, they are good; if they are not, they are bad, as coming within the rule against perpetuity. There have been many cases on the subject, and the

(1) P. 11.
(2) 3 M. & S. 407.
(3) 1 Burn's Ecc. Law, 352.
(4) 7 Ves. 58, n.
(5) 4 Ves. 708.
(6) 6 Beav. 353.
(7) 3 K. & J. 529.
(8) 1 Ph. 185.
(9) 6 Ves. 404.
(10) 4 K. & J. 479.
(11) 1 D. F. & J. 399.

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Court upholds such gifts as charities if they come within what has been called the equity of the statute of *Elizabeth*.

The gift for the perpetual repair of a grave or vault not within the church has been held not to be a charity, and therefore void.

With respect to the memorial window, it is argued that this window, having been placed in the church, forms part of the fabric of the church; and that a gift for the perpetual repair of a church being a charity, the gift here for the perpetual repair of the window, which is a part of such fabric, is equally good as a charity; and I do not see how to avoid that conclusion. It is contended, indeed, that the testatrix, in creating this trust, had no idea of making a charitable gift, her only object being to do honour to the memory of her mother. But the Court cannot inquire into the motives of the donor if the gift is in its nature a charity. I must hold the gift valid so far as relates to the repair of the window.

With respect to the monument in the church, there is no decision on the point how far a gift for the perpetual repair, not of the *fabric* of the church, but of the *ornaments* in the church, can be treated as a charity. In the absence of authority, I think I ought to hold such a gift to be a charity, and as such, good. It seems to me to come within the equity of the statute, for it is clearly for the benefit of the inhabitants of the parish that not only the fabric, but also that the ornaments of the church, whether in the shape of mural tablets or otherwise, should not be permitted to fall into a state of dilapidation and decay; and therefore it appears to me that the gift for keeping in perpetual repair this monument is a good charitable gift. I apprehend that a gift of a sum of money to keep in perpetual repair the monuments in *Westminster Abbey* would be a good charitable gift. I cannot doubt that a gift to keep in perpetual repair the organ or bells of a church would be valid, and I see no reason why a gift to keep the monuments in the church in repair should not be equally good.

The question remains, what ought to be done with the fund? The cases shew that where a single fund is given for several objects of this nature, and one of them is bad, the principle on which the Court acts is, that if it can be ascertained what are the proper proportions to be attributed to the several objects, it directs an inquiry on the subject; but if, from the nature of the gift, it

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appears impracticable to fix the proportions, the Court divides the fund equally between the different objects; and I think the latter is the course I must adopt in this case, as I feel assured that no correct conclusion could be arrived at on an inquiry.

The one-third of the fund attributable to the gift for the repair of the vault, which is void, falls into the residue. The remaining two-thirds, being in respect of the repair of the window and monument in the church, which are good gifts, will go to the minister and churchwardens, who are the persons to execute the trust.

With regard to the gift of the surplus for the keeping in repair and ornamenting the chancel, it appears to me that this is a good charitable gift. The minister and churchwardens will, therefore, apply the surplus dividends to that object.

Costs of all parties out of the fund; the trustees' costs as between solicitor and client.

Solicitors: Messrs. *Wilde & Markby;* Messrs. *Gregory & Co.;* Messrs. *Routh, Rowden, & Stacey*; Mr. *Skilbeck.*

In re WOOTTON'S ESTATE.

V.-C. K. 1866 *Jan.* 29; *Feb.* 24.

Lands Clauses Act, § 74—*Tenant for life and remaindermen—Building lease.*

A railway company took land subject to a building lease which had been granted in consideration of an outlay in building at less than rack-rent, and of which eleven years were unexpired, and paid the compensation money for the reversion, subject to such lease, into Court, under the *Lands Clauses Consolidation Act*:—

Held, upon Petition by tenant for life of the land for payment of the dividends of the fund in Court to her, that so much of the dividends should be paid to the tenant for life as would compensate her for loss of rent sustained by the company having taken the land, and that the remainder of the dividends should be accumulated till the end of the lease, so that there might then be in Court a sum representing the value of the whole fee.

THIS was a Petition praying the investment and payment of dividends to the Petitioner of a sum of £4840, the amount of compensation money paid by the *Brighton Railway Company* into

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Court, under the 69th section of the *Lands Clauses Consolidation Act*, in respect of certain property at *Camberwell*, being a portion of the real estates of the late *Thomas Wootton*, of which property the Petitioner was tenant for life.

Thomas Wootton, at the time of making his will in 1859, and of his death in 1862, was seised in fee of certain lands, subject to a building lease; and by his will he devised the property, subject to such lease, to his wife, the Petitioner, *Maria Ann Wootton*, for her life, or widowhood, with remainder to her son and daughter.

The lease subject to which *Thomas Wootton* was entitled, had been granted by his predecessor in title in the year 1786, for a term of ninety-one years (of which eleven years were now unexpired), at a rent of £40 a-year. This rent was admitted to be very much below the rack-rent, the lease having been granted in consideration of the lessee laying out a sum of not less than £600 in building on the property, which sum (at the least) it appeared had been laid out.

The £4840 so paid into Court by the railway company did not represent the value of the whole fee, but only of the reversion, subject to the lease, the company having separately dealt with the lessee for the value of the lease; and it had been arranged that £10, part of the £40, should be apportioned so as to be received by the company in respect of the portion of land taken by them; so that, in effect, the loss the Petitioner had sustained was £10 a-year, while the interest on the £4840 would amount to about £150 a-year.

Mr. *Speed*, for the Petitioner, asked that the whole of the income of the £4840 might be paid to her, and referred to the 78th section of the *Lands Clauses Consolidation Act*.

Mr. *Pitcairn*, for the persons entitled in remainder, submitted that the tenant for life was entitled to £10 a-year only, and not to the whole income. The present case was not one of a lease at a rack-rent, but it was a building lease granted in consideration of a sum of money being expended in building, and did not come within the section referred to, but under the 74th section of the Act, which authorized the Court to apply moneys paid into Court under the Act, in respect of leases or reversions, in

such manner as to give to the parties the interest to which they were entitled. The £4840 was not the value of the fee which the persons in remainder were entitled to have in Court when the lease determined; such value could only be obtained by paying £10 a year to the Petitioner, and accumulating the rest of the income, which, the lease being a building lease, must be treated as capital. He referred to *Re Steward's Estate* (1); *Jeffreys* v. *Conner* (2); *Re Money's Trusts* (3); *Ex parte Archbishop of Canterbury* (4); *Morgan's Orders* (5).

Mr. *Taylor* appeared for the railway company.

Mr. *Speed*, in reply.

Feb. 24. SIR R. T. KINDERSLEY, V.C.:—

The tenant for life claims to be entitled to the whole of the income of this sum of £4840. What the jury had to value was not the whole fee, but the reversion subject to the lease; and it must be assumed that the jury put the right and true value on what they had to value. The value of the whole fee would be the value of this reversion *plus* the value of the lessee's interest, which has been separately dealt with.

Now it is clear that the persons entitled in remainder are entitled on the determination of the lease to have the value of the whole fee forthcoming in Court, which they will not have if the tenant for life receives the whole income of the £4840 during the remainder of the term of the lease; and there is no reason why the tenant for life should receive more income than she did before the land was taken. The only loss occasioned to her by the taking of the land is a loss of £10 a-year income; for it is not a case of a person in occupation of premises being turned out of that occupation. It is quite clear that, unless there be an accumulation of some portion of the income, there will not, at the determination of the lease, be in Court such a sum as will represent the value of the whole fee; and it appears to me that

(1) 1 Drew. 636. (2) 28 Beav. 328. (3) 2 Drew. & Sm. 94.
(4) 23 L. T. 219. (5) P. 37.

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there ought to be an accumulation of all the income, except so much thereof as is necessary to compensate the tenant for life for the loss she sustains by reason of the land being taken, which is only £10 a-year. This is in truth only the same equity as is commonly applied to cases of ecclesiastical leases which have been granted on fines. The fund must be invested, and the Petitioner must be declared entitled to £10 a-year out of the income, the remainder of which must be accumulated.

Solicitors: Messrs. *Wootton & Son;* Messrs. *Faithful.*

EARL OF SHREWSBURY *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY.

V.-C. K.
1865
Dec. 11, 12, 13, 18.

Railway Company — Contract by Promoters — Ultra vires — Peer, payment to for Countenance and Support of Bill — Companies Clauses Act, s. 65 — Expenses of obtaining Act.

The promoters of a railway company contracted with a landowner, being a peer of Parliament, to pay him £20,000 personally, for his countenance and support in obtaining their Act, such sum to be independent of the ordinary payment for land, severance, and other usual compensation. After the passing of the Act the directors of the company, when formed, ratified the contract, but having doubts whether, under the *Lands Clauses Act*, the landowner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be retained by the company or paid into Court. A separate agreement stipulated for the quantity of land to be taken for the railway, and the amount to be paid by the company:—

Held, that the original contract and the contract by the directors after the formation of the company to pay a sum of money for countenance and support previously given in procuring the Act, were *ultra vires* of the company, and could not be enforced against the company as payment of expenses of obtaining the Act, under the 65th section of the *Companies Clauses Act*, or otherwise.

The doctrine laid down by Lord *Cottenham*, that a company after formation is bound by the contracts of its promoters, disapproved of; and so far as it applies to anything to be done which is *ultra vires* of the company, must be considered as overruled.

THIS bill was filed by the Earl of *Shrewsbury* against the *North Staffordshire Railway Company*, *Ambrose Lisle Phillips*, and *Charles Robert Scott Murray* (representatives of *John*, Earl of *Shrewsbury*), and *James Robert Hope Scott* and *Edward Bellasis* (representatives of *Bertram Arthur*, Earl of *Shrewsbury*).

It stated that, by virtue of a certain Act or Acts of Parliament, the *Shrewsbury* estates were limited to the heirs male of the body of *John*, the sixteenth Earl of *Shrewsbury*, with remainder to the use of *Bertram Arthur*, seventeenth Earl of *Shrewsbury*, and the heirs male of his body, with remainder to the use of the person upon whom the title of Earl of *Shrewsbury* should descend, and the heirs male of the body of such person, with a proviso that no tenant in tail of the said premises should alien any part thereof,

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or do anything to the disinherison of the heirs inheritable as aforesaid.

In the year 1845 the tenant in tail in existence was Earl *John*. He was succeeded by Earl *Bertram*, and Earl *Bertram* was succeeded by the present Earl, who was the plaintiff in this suit.

In November, 1844, a railway was projected which was intended to pass through the *Churnet Valley*, forming portion of the *Shrewsbury* estates, and situate near the family mansion called *Alton Towers*. There was already a canal and a small river or stream passing through that valley. It was considered by Earl *John* that the making of that railway would be prejudicial to the settled estates which were the subject of the parliamentary entail, namely, *Alton Towers*, and Earl *John* was disposed to oppose the bill. The Promoters of that company, through Mr. *Sharp*, who was the chairman, or the person taking the principal and active part in the matter, were desirous of buying off the opposition which they anticipated from Earl *John*, and accordingly, on the 25th of February, 1845, Mr. *Sharp*, on behalf of the Promoters, entered into a written contract with Earl *John*, which was in these terms:—

"Heads of Arrangement made the 25th day of February, 1845, between the Earl of *Shrewsbury* and *Robert C. Sharp*, Esq., chairman of the proposed *Churnet Valley Railway Company*, on behalf of the directors and himself. It is agreed that, in the event of such company being incorporated by Act of Parliament, the sum of £20,000 be paid to the Earl of *Shrewsbury* or his executors before possession is taken of his land for the purposes of the Act. That the said sum be independent of the ordinary payment for land severance or other usual compensation, the amount of which, when ascertained, shall be paid into the Court of Chancery. That if possible a clause shall be introduced into the Act, permitting the payment of the moneys payable for these estates to be paid to the account now existing in the Court of Chancery, instead of a new account to be opened for the purpose of this Act. That in the formation of the railway no deviation shall be made from the parliamentary line, otherwise than the deviation marked on the plan agreed to and signed respectively by Lord *Shrewsbury* and Mr. *Sharp*. The company shall not have power to enter upon

any lands of the Earl for the purpose of taking stone or other materials, or depositing soil or refuse, building huts or station houses, or making bricks or tiles, without the consent of Lord *Shrewsbury* in writing; they shall not create stagnant waters, or bore holes; the ditches to the embankments to be made conducive to drainage. The company to make all necessary bridges of communication, culverts, crossings, and approaches, and to make good all damages done to tenants and occupiers, and to execute their works on Lord *Shrewsbury's* land within three years from the passing of the Act; maintaining a good and effective police. The company shall dress down and grass the slopes or embankments on Lord *Shrewsbury's* land. That all bridges made over public or private ways, or over the line of railway, shall have a parapet six feet high, if required. The company to erect a first-class station at *Oakamoor*, and so as to form no obstruction or inconvenience to the approach from thence to *Alton Towers*, the designs and working drawings for which to be submitted to Mr. *Pugin*, at a cost of £100. The ornamental trees near the line and on the estate to be protected from damage by the works of the railway. The chairman of the company, conjointly with others of the directors, shall, if required, at any time previous to the bill being read in the House of Lords, execute a more formal agreement or contract, as Lord *Shrewsbury* may be advised, for the purpose of securing the fulfilment of this arrangement. In the event of any difference of opinion or dispute arising on the terms and intentions of this agreement, or the mode of carrying it into effect, *John Wilson Patten*, Esq., M.P. for *North Lancashire*, shall determine such difference, and each party shall be bound by his decision."

The bill for promoting the *Churnet Valley Railway Company* was never introduced into Parliament; but the undertaking intended to have been promoted was subsequently adopted by, and became merged in, the undertaking of the Defendants, the *North Staffordshire Railway Company*. Previously to the 10th of October, 1845, a provisional committee was formed, for promoting three several bills in Parliament, including, among others, the Defendants' bill, intituled "*The North Staffordshire Railway* (*Churnet Valley Line*) *Bill*, 1846." The last-named provisional committee agreed with the Promoters of the proposed *Churnet Valley Railway*

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Company to take up their project, and to assume all the liabilities and rights of such provisional committee, including their agreement of the 25th of February, 1845, with the Earl of *Shrewsbury;* and at a meeting of the provisional committee of the then proposed *North Staffordshire Railway Company,* held on the 10th of October, 1845, the chairman reported that the arrangements with the landowners were progressing favourably, and that he considered the agreement made between the *Old Churnet* directors and Lord *Shrewsbury* was one which the *North Staffordshire* directors were in honour and good faith bound to fulfil; and it was resolved that the arrangements, signed by Mr. *Sharp* and Lord *Shrewsbury,* should be considered binding on the *North Staffordshire Company.*

On the 26th of June, 1846, the said three bills having passed, received the Royal assent; the Defendants were incorporated, and, by one of such Acts, they were authorized to execute the line of railway through the *Churnet Valley.* At a meeting of the directors of the *North Staffordshire Railway Company,* held on the 29th of June, 1846, three days after the passing of the Acts, a resolution was passed that the agreement and arrangements previously entered into with Lord *Shrewsbury* be approved, and that the solicitors of the company be instructed to carry them into effect, and that the common seal be affixed to such agreements as the solicitors should advise to be necessary.

By the *North Staffordshire Railway Act,* 1847, the three beforementioned Acts were repealed, except as to so much of the *North Staffordshire Railway* (*Pottery Line*) *Act,* 1846, as established and incorporated the *North Staffordshire Railway Company,* and vested in them the *Trent & Mersey Navigation;* and by the same Act of 1847, powers were given to the Defendants for the construction, maintenance, and management of their aforesaid undertaking, called the *North Staffordshire* (*Churnet Valley*) *Line,* and for the purchase and taking of lands for the purpose thereof, including two parcels of land containing respectively 20A. 0R. 2P. and 16A. 3R. 11P., situate in the parishes of *Alton* and *Rocester,* which formed part of the settled estates; and the Defendants were further authorized to use, for the diversion of the river *Churnet,* 3R. 19P. of land, also situate in the parishes of *Alton* and *Rocester,* and further part of the settled estates.

The *Lands Clauses Act*, 1845, was passed after the said agreement of the 25th of February, 1845, and was incorporated in all the *North Staffordshire* Railway Acts; and in consequence of the provisions contained in the 73rd section of the said *Lands Clauses Act*, the Defendants declined to pay the said sum of £20,000 into the hands of Earl *John*.

Various negotiations then took place between the Defendants and Earl *John* and his agents, as to the amount and valuation of the land to be purchased by the company, and for the purpose of carrying out the agreement of the 25th of February, 1845; and at length an instrument was executed by Earl *John* and the Defendants, dated the 20th of January, 1848, whereby, after reciting that the bill for incorporating the Defendants' company had been opposed through Parliament by Earl *John*, and with a view to the countenance and support of the said Earl to the undertaking, and to meet the expenses and inconvenience to which the Earl would, by reason thereof, be personally subject, the then Promoters thereof, in the event of the company being incorporated, had promised that, over and above, and exclusive of and in addition to the compensation money to be paid by the company for all damage and inconvenience by severance or otherwise, which should be occasioned to the remainder of the estate of the said Earl by the purchase and taking of the said land, and which said purchase-money was to be paid into this Court, they would pay to the Earl the sum of £20,000; and reciting that doubts had arisen, or might arise, whether it was lawful for Earl *John* to retain the said sum of £20,000, or any portion thereof, to his own use, and whether such sum should not be deemed to have been contracted to be paid for and on account of the several parties interested in such land, as well in possession as in remainder, reversion, or expectancy; and further reciting that it would be for the benefit of Earl *John* that the said sum of £20,000 should not be paid into the Bank of *England;* and it had, therefore, been arranged between the Earl and the company that the company should retain possession thereof, and should enter into covenants therein contained in respect thereof, and that the Earl should also enter into a covenant for indemnifying the company from the consequences of such arrangement. It was witnessed that the company covenanted with the Earl, his

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heirs and assigns, that they would, so long as they should retain possession of the £20,000, pay to Earl *John*, his executors, administrators, or assigns, interest on the said sum at the rate of £5 per cent. per annum; and it was provided that the Defendants should, if legally required to do so, pay into the Bank of *England*, in the name of the accountant-general, the said sum of £20,000, and that thereupon, and upon payment of interest upon the said sum at the rate of £5 per cent. per annum to the persons entitled thereto for the time being, the covenant should cease and be void; and the Earl covenanted to indemnify the company against all losses, damages, and expenses they might incur relative to the said sum, or the payment of interest thereon.

There was also an indenture of even date with the last-mentioned deed of covenant, and made between Earl *John* and the railway company, for the sale and purchase of so much of the settled estates as should be required for the purposes of the railway; but this indenture was abandoned by the mutual consent of both parties, and, in lieu thereof, an agreement was executed in the year 1850, by which the Earl, as tenant in tail in possession of the said estates, agreed to sell to the railway company the land so required by them for the sum of £4473, which said sum was paid into Court and invested, and the dividends were ordered to be paid to the owner of the estates for the time being. The Defendants paid to Earl *John* interest upon the said sum of £20,000 from the date of the indenture of covenant of the 20th of January, 1848, until his death in November, 1852, but no part of the principal sum was paid to Earl *John*, nor had any part of it or any interest in respect of it ever been paid since Earl *John's* death to any other person by the Defendants, and the same still remained in their possession.

Earl *John* by his will, dated in August, 1845, appointed the Defendants, *A. L. Phillips* and *Charles S. Murray*, his executors. Earl *Bertram Arthur*, shortly after his accession to the earldom and settled estates, instituted a suit by his next friend (he being then an infant) against the Defendants for the purpose of enforcing payment of the said sum of £20,000, but the suit had not been brought to a hearing at the time of his death in the year 1856.

Earl *Bertram Arthur* made his will on the 3rd of April, 1856,

and appointed the Defendants *J. R. H. Scott* and *E. Bellasis* his executors, but they having declined to prosecute the suit instituted by their testator, this bill was filed by the present Earl of *Shrewsbury* against the *North Staffordshire Railway Company*. By the bill it was alleged that the agreement of the 25th of February, 1845, was entered into for the purpose of obtaining reasonable and proper terms for the protection of the settled estates; that the said agreement was adopted by the directors of the company after its formation; and upon the faith of such agreement being carried into effect, Earl *John* had given his support and countenance to the undertaking; that the said Earl had not directly or indirectly made any corrupt use of his power or position as a peer of Parliament in the furtherance of the company's bills; and that the agreement so adopted and acted upon was a valid and binding agreement on the company, and was not in any way contrary to public policy.

The bill alleged that the Defendants *Phillips* and *Murray*, as representatives of Earl *John*, claimed to be entitled to the £20,000, as belonging to the personal estate of the testator; but the Plaintiff submitted that the said sum ought to be invested in the purchase of other estates to be settled to the same uses as the settled estates. And it stated that the Defendants *Scott* and *Bellasis*, as executors of Earl *Bertram Arthur*, claimed to be entitled to the interest upon the £20,000 which accrued due during the life of Earl *Bertram Arthur*.

The bill prayed that it might be declared that the agreement of February 25, 1845, was valid and binding upon the Defendants the railway company; that the said sum of £20,000 belonged to the settled estates, whereof the Plaintiff was tenant in tail in possession, and ought to be laid out in the purchase of other estates to be conveyed to the uses of the settled estates, and that the Plaintiff was entitled to the interest since the death of Earl *Bertram Arthur*, and would be entitled to the interest on the rents of the said lands, when purchased, for his life; and that the Defendants the railway company might be ordered to pay the said sum accordingly.

The Plaintiff, by an affidavit made in the suit, stated that, although he had been a director of the company for many years,

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and had been a shareholder ever since the year 1846, he was not aware of the existence of the agreement of February, 1845, until the month of April, 1860, when he accidentally became acquainted with the circumstances attending it.

The Defendants the railway company, by their answer stated that the agreement of February, 1845, was entered into for the purpose of inducing the then owner of the settled estates to withhold his opposition to the undertaking, and to give his support to the bill, and that the £20,000 was to have been paid to him for his own personal and absolute benefit; that the said sum was independent of any payment for the value of the land or compensation for severance or other injury. They insisted that the agreement was not binding upon them, and that they could not legally apply the funds of the company in payment of the sum so agreed upon, or in payment of interest on the same; and they submitted that the Plaintiff's claim was a money demand and ought to be prosecuted at law, and also that the right to enforce such claim was barred by the *Statute of Limitations*.

Mr. *Rolt*, Q.C., Mr. *Baily*, Q.C., and Mr. *Wickens*, in support of the bill, contended, first, that the agreement entered into by the promoters of the company was valid as against the company after incorporation; secondly, that the thing agreed to be done was such that it would be within the powers of the company to do it when incorporated; and, thirdly, that if the thing agreed to be done was not strictly within the powers of the company when formed, the defect in the powers of the company to do that which was contracted for was cured by the acts of the company after incorporation. Here the thing agreed to be done was entirely within the powers of the company. It was not illegal for a company to buy off an opposition, and to pay all expenses incurred in the promotion of a scheme. It was not illegal for a peer of Parliament to enter into such a contract as this. It was not because he was a member of Parliament that he could not contract to do that which was for the benefit of his estate. It was provided by the 65th section of the *Companies Clauses Consolidation Act* (1) that the moneys raised by a company should, in the first instance, be

(1) 8 Vict. c. 16.

applied in paying the costs and expenses incurred in obtaining the special Act, and all expenses incident thereto. The sum agreed to be paid to the Earl of *Shrewsbury* was money incurred in obtaining the Act, for without this payment it was probable that the Act never would have been obtained. In the case of *The East Anglian Railway Company* v. *The Eastern Counties Railway Company* (1), the company entered into a covenant which was not within the scope of their powers, and it was held that the company had no power to pay the costs of another railway company in soliciting bills then pending in Parliament; but that was no authority in the present case. In *The South Yorkshire Railway Company* v. *The Great Northern Railway Company* (2) it was held that the company might do certain things because they were within the powers of their Act. Here the contract was under the seal of the company, who recognized the acts of the promoters, and this would have made a great difference in Baron *Bramwell's* view of the case of *Bateman* v. *The Mayor of Ashton-under-Lyne* (3). The case of *Edwards* v. *The Grand Junction Railway Company* (4) was a case exactly in point, where Lord *Cottenham* held, that withholding opposition to a bill then before Parliament formed a good consideration for an agreement to do certain acts, and that the railway company was bound to perform an agreement made by the projectors of it prior to incorporation. The company was as much bound by the agreement as if the clauses had been inserted in their Act of Parliament.

This case was followed by *Stanley* v. *The Chester & Birkenhead Railway Company* (5), and by *Lord Petre* v. *The Eastern Counties Railway* (6). In *Greenhalgh* v. *The Manchester & Birmingham Railway Company* (7), the Act originally contemplated did not pass, and it was on that ground that the company was held not to be bound by an agreement entered into by the projectors of that railway, and also because the projectors had determined the agreement by notice. In this case the Defendants had adopted the agreement entered into by the projectors. In *The Vauxhall Bridge Company*

(1) 11 C. B. 775.
(2) 9 Ex. 55.
(3) 3 H. & N. 323.
(4) 1 My. & Cr. 650.
(5) 3 My. & Cr. 773, and 9 Sim. 264.
(6) 1 Rail. Ca. 462.
(7) 3 My. & Cr. 784.

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v. *Earl Spencer* (1), it was held not to be illegal to give securities to persons on consideration of their withdrawing their opposition to a bill in Parliament.

In *Simpson* v. *Lord Howden* (2) it was also held, that a contract with a peer of Parliament that for a consideration he would consent to a certain bill being passed, was not illegal, as he had a right to bargain for compensation for his land, though it might become illegal by certain stipulations, such as concealment from the Legislature and the public. The agreement in this case was not illegal upon the face of it, and it was not illegal for a peer of Parliament to enter into an agreement to withdraw his opposition to the bill. In *The Earl of Lindsey* v. *The Great Northern Railway Company* (3), it was held that an agreement to oppose one line of railway and promote another was not illegal.

The following case was also cited on this point:—*The Eastern Counties Railway Company* v. *Hawkes* (4); and the same case before the Lord Chancellor and also before Vice-Chancellor *Knight Bruce* (4). It was there held to be not *ultra vires* to enter into an agreement with a landowner to take part of his land, and to accept from him a withdrawal of opposition to a bill in Parliament. If the Act under which the company is incorporated enabled the company to pay all preliminary expenses, or expenses attendant thereon, it could not be *ultra vires* in the company to enter into such a contract as this. In *Preston* v. *The Liverpool Railway Company* (5) the promoters were treated as agents of the company, and in *The Caledonian Railway Company* v. *The Magistrates of Helensburgh* (6) it was held that anterior arrangements would bind the company if adopted by them. Suppose the contract was illegal or *ultra vires* the powers of the company when they should be called into existence, still it had become legal by its adoption after the formation of the company. If the company took the land and derived the benefit of the withdrawal of opposition by Lord *Shrewsbury*, they were bound in justice and equity to fulfil the contract. The contract was not simply for the payment of

(1) Jac. 64.
(2) 3 My. & Cr. 97; 10 Ad. & E. 793 & 807; and 9 Cl. & F. 61.
(3) 10 Hare, 664.
(4) 5 H. L. C. 331; 1 D. M. & G 737; 3 D. G. & Sm. 743.
(5) 1 Sim. N. S. 586.
(6) 2 Macq. 391.

£20,000 for withdrawing opposition, but it was also for giving up the land and for the inconvenience and loss sustained by the Earl, who was the tenant in possession. The contract for the purchase of the land must be considered as one contract with the payment of £20,000. It was not a gratuitous adoption by the company of an agreement which they were not bound to perform; but, whether they were bound or not, they adopted the contract by a formal resolution three days after they came into existence as a company, by a subsequent formal deed executed by them, and by the payment of interest upon the money up to the death of Earl *John*: *Gooday* v. *The Colchester Railway Company* (1). It could not now be contended that Earl *John* was personally entitled to the benefit of this money, since it had been decided in *Pole* v. *Pole* (2) that the benefit of it must be secured for the persons entitled in remainder to the settled estates.

Mr. *Charles Hall*, for the executors of Earl *Bertram*.

Mr. *Osborne*, Q.C., and Mr. *Dickinson*, for the executors of Earl *John*.

The *Attorney-General* (Sir *R. Palmer*), Mr. *Glasse*, Q.C., and Mr. *Bovill*, for the Railway Company:—

This contract was *ultra vires* when it was first entered into, and could not therefore be binding on the company after its formation. There was no question in this case of honesty, because the directors were bound by the powers of their Act, and were bound also to act legally on behalf of their shareholders. If the contract was not valid as made by the promoters, it could not be rendered valid by the company after formation. The seal of the company would add nothing to the validity of a contract which was originally invalid. The directors of the company, after its formation, were bound to apply the funds for the purposes pointed out by their Act, and the payment of £20,000 to a landowner for the withdrawal of his opposition was not within the powers of the Act of Parliament. The case of *The Eastern Counties Railway Company* v. *Hawkes* does not affect this question, for there the contract was for the purchase of land; and though it might have

(1) 17 Beav. 132. (2) 2 Dr. & Sm. 420. 11 Jur. N.S. 477

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been a large sum of money to pay for it, there was nothing illegal in the original contract. It was laid down in *Salomons* v. *Laing* (1), *Gage* v. *The Newmarket Railway Company* (2), and *Macgregor* v. *The Dover & Deal Railway Company* (3), that railway companies were bound to apply their moneys for the purposes directed by the Act of Parliament, and no other. Such a contract as this, if made by the company after its formation, would not have been within their powers, and if so, it could not have been within the powers of the promoters of the company.

It was necessary in this case to examine the conflicting decisions of Lord *Cottenham* and the present Lord Chancellor. The decision of Lord *Cottenham* in *Edwards* v. *The Grand Junction Railway Company*, followed by *Stanley* v. *The Chester & Birkenhead Company* and *Lord Petre* v. *The Eastern Counties Railway Company*, was distinctly disapproved of by Lord *Cranworth* in the case of *The Caledonian Railway Company* v. *The Magistrates of Helensburgh*, and in *Preston* v. *The Liverpool Railway Company*.

In the latter case his Lordship said, that if the validity of the contract had depended upon the withdrawal of Mr. *Preston's* opposition to the bill, he should have taken time for consideration, and that there were grave objections to the doctrine laid down by Lord *Cottenham*. His Lordship observed, moreover, that the decision in Lord *Petre's* case made everybody start who heard it, and if the case before him had depended on that, he should have asked for time to consider it. But if the general doctrine contended for, namely, that the directors were bound by the contracts of the projectors, was a sound doctrine, still they could only be so bound by contracts which the company might itself make after the bill had passed, and the incorporation had been completed. Lord *Campbell* had decided that it would be *ultra vires* to enter into a covenant to pay a sum of money to a person for merely consenting to withdraw an intended opposition. Lord *Brougham* had also coincided with Lord *Cranworth* in doubting the soundness of Lord *Cottenham's* decisions. The contract to pay Lord *Shrewsbury* £20,000 was quite apart from the purchase of the land, which was altogether a separate affair. The danger of the doctrine which bound the directors and shareholders of a company by acts

(1) 12 Beav. 339. (2) 18 Q. B. 457. (3) 18 Q. B. 618.

done by the promoters, derived considerable force from the statement made by the Plaintiff in this case, who stated that, although he had himself been a director of the company for some years, and a shareholder ever since the year 1846, he could not remember that he was ever made aware of this contract entered into with Earl *John* until the year 1861. If this was the case with regard to the Plaintiff, how was it possible that the shareholders should know what sums they were liable for, previous to the formation of the company? In the case of *Williams* v. *The St. George's Harbour Company* (1) the money contracted to be paid by the promoters was for consequential damage to Colonel *Williams's* land, and Lord Justice *Knight Bruce* said that the judgment obtained by the Plaintiff would have been binding upon the company if made after the passing of the Act, and must therefore be treated as binding upon them; and in *The Company of Proprietors of the Leominster Canal Navigation* v. *The Shrewsbury & Hereford Railway Company* (2) Vice-Chancellor *Wood* said, that that which the directors could not do after the formation of a company the provisional directors could not do before, for the purpose of binding the company, and this was decided in *The Caledonian Company* v. *The Magistrates of Helensburgh*. If this is the law: that money could not be applied except for purposes within the meaning of the Act when passed, it is clear that the contract in question was not within the powers of the present Act. If the arguments on behalf of the Plaintiff were to prevail they would go to this extent: that all payments to buy off opposition to a bill, however exorbitant, would be included as costs and expenses in obtaining the Act. The meaning of the 65th section must necessarily be, "all expenses properly incurred," that is, expenses incident to obtaining the Act in the ordinary course, but an agreement to pay anything beyond what would be payable under the Act, for something not mentioned on the face of the Act is *ultra vires*. It is plain that upon this agreement there was nothing but buying off the opposition of the Earl, for which the £20,000 was to be paid; all other expenses, such as value of land, severance, and any act by which land might be injuriously affected, were to be determined under the ordinary powers of the Act, and paid for *ultra* the £20,000.

(1) 2 De G. & J. 547. (2) 3 K. & J. 654.

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This sum, then, was a mere bonus to the Earl beyond every other payment for securing his non-opposition to the Act, and it was evidently intended to be paid to the Earl personally, or to his executors, administrators, and assigns, and not for the benefit of the settled estates. It is said that some of the sections in the *Lands Clauses Act*, such as the 68th, 73rd, and 76th, recognised such a contract as this; but it is not so. Those sections only provide for the due settlement of such sums as may be payable, but that is quite beside the question whether the company had power to enter into such a contract, and the Act only applies to sums of money which may be properly payable by the company. This £20,000 was not properly payable for any species of compensation under the Act. It had nothing to do with the Act, and was altogether *ultra vires*. The company took no advantage from the contract in respect of the £20,000. They did not obtain an acre of land for it, nor an atom of benefit. All the advantage was to the Earl, who was to get the money and give nothing in return, except his co-operation in obtaining the Act. Then as to the subsequent acts done by the company, there was no intention on their part to do any act to bind the company; their object seemed to be to sail as near the wind as possible, and, while securing to the Earl the benefit of the contract, to preserve themselves against any liability. Even a ratification under seal was useless, since it was not within the powers of the company to enter into such a contract. Under any circumstances this is a mere money demand, and Lord *Shrewsbury* cannot maintain his demand in equity. He is neither the heir nor the executor of Earl *John*, and it is for the heir or the executor to go to law and sue the company by an action.

The following cases were also cited:—*Maunsell* v. *The Midland Great Western (Ireland) Railway Company* (1); *Ernest* v. *Nicholls* (2); *Burt* v. *The British Nation Life Assurance Association* (3).

Mr. *Rolt*, in reply:—

The Plaintiff's right to this money, or the interest upon it in perpetuity, rests upon two alternative grounds: either the contract

(1) 1 H. & M. 130. (2) 6 H. L. C. 401. (3) 4 De G. & J. 158.

of 1848 must be treated as an independent contract, by which the company bound themselves, or they must be treated as bound by the original agreement of 1845, and the steps taken subsequent to that period. In construing the deed of covenant of 1848 with the contemporaneous contract for the purchase of the land, it must be taken as a payment of £20,000 in consideration, first, for the personal inconvenience of the occupier of the estate, wholly irrespective of damage to the land, and severance and residential damage; and, secondly, there is this consideration in treating it as an independent contract, that the price of the land should be settled by agreement, and not by arbitration, or a compulsory trial by jury. The company have had the benefit of this agreement up to the present time, and it was a very desirable thing to settle the claims of a landowner by amicable agreement instead of being forced to determine the value by reference to a jury. The personal inconvenience to the Earl being included in the bargain, in addition to the value of the land, was a very great boon to the company. Thirdly, the company also obtained the non-opposition of the Earl to their scheme, and that non-opposition was a thing continuing after the passing of the Act, and was not at an end when the deeds of 1848 were executed; all of these considerations formed, in fact, part of the contract. The company derived considerable benefit from the contract taken as a whole, and the £20,000 was not, as contended, a mere douceur to the Earl for withdrawing his opposition.

But if the deeds of 1848 did not constitute a new contract, still the company were bound by the agreement of 1845, which they had distinctly adopted. The doctrine laid down by Lord *Cottenham*, although it may have been shaken by the cases decided in the House of Lords, still remains the law of the land. Those principles have been acted upon ever since, and ought now to be recognised. In all the cases decided by Lord *Cottenham*, the withdrawal from opposition was a part only of the consideration for the contract; and so it was in this case; and although an extravagant sum might be paid for the land, the contract is not illegal because it contains the additional consideration of withdrawal from opposition on the part of the landowner. Therefore, whether this case rests upon the deeds of 1848 or the previous contract of 1845,

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the company, who have derived the benefit of it, are bound to fulfil the whole contract.

Dec. 18. SIR R. T. KINDERSLEY, V.C., after stating the terms of the agreement of the 25th of February, 1845, continued:—

2 Ea 374-7

I have read through the stipulations contained in this agreement, for the purpose of observing that, with respect to all the matters stipulated for, it is the company who are to be under the obligation to do, or to abstain from doing, these several things. There is nothing that Lord *Shrewsbury* is to do; there is nothing onerous to him and beneficial to the company. On the contrary, everything that is to be done is onerous to the company and beneficial to Lord *Shrewsbury* or to the *Shrewsbury* estates. And, therefore, none of those things which are there stipulated can constitute a consideration for the £20,000 which is contracted to be paid to Lord *Shrewsbury*.

The question, then, that first presents itself, is this: what was this £20,000 to be paid for? What was the consideration for it? What *quid pro quo* was there? What benefit was the company to get for which they were to pay £20,000? The agreement itself, which I have just read, is totally silent upon the subject. One thing, however, is perfectly clear, that it was intended that this sum should go into the pocket of Earl *John*, and of nobody else. It was intended that he personally, individually, and exclusively should have the £20,000, and that no succeeding tenant in tail of the estates should have the smallest benefit from it.

Now, upon that I may observe that, although such was clearly the intention of the parties, yet, if it had happened that Earl *John* had actually received that £20,000, I should have held, in accordance with my decision in *Pole* v. *Pole* (1), that Earl *John* was a trustee of that fund for the benefit of the persons successively interested in the settled estates. I should not have entertained the smallest doubt about that. And the present Lord *Shrewsbury*, founding himself upon that, and insisting that the £20,000, which was agreed to be paid to Earl *John*, ought to be for the benefit of the successive tenants in tail of the settled

(1) 2 Dr. & Sm. 420.

estates, contends that he has a right to put himself into the position of Earl *John* for the purpose of enforcing against the railway company the contract which the promoters entered into with Earl *John* for his own personal benefit, and which (as it is contended) Earl *John* might have enforced against the company. The question remains, could Earl *John* have enforced that contract against the company?

Now, as I have said, except that the agreement of the 25th of February, 1845, shews clearly and beyond all doubt or ambiguity, that the intention of the parties was, that the £20,000 should be for the personal and exclusive benefit of Earl *John*, it does not disclose or hint at the consideration for which that sum was to be paid. It certainly was not intended as compensation for any land to be taken, nor for any severance which the taking of land might occasion, nor with reference to any of those compensations which a landowner may be entitled to insist on by reason of injury sustained in consequence of the construction of the railway or the operations of the company, such as the general injury inflicted on his property, or that sort of injury which is called residential damage, for that his residence would be less comfortable, less convenient, less valuable, or less desirable, than it was. The £20,000 was not meant to touch anything of that kind. It is expressly provided by the clause I have read, that the £20,000 is to be independent of the ordinary payment for land, severance, or other usual compensation, the amount of which is to be ascertained in the usual way.

It has been argued, indeed, that residential damage, that is, that undefined mischief which the occupier of a house sustains by the proximity of a railway, cannot be called an usual compensation, because in a large number of cases there is no residence on the property to give rise to the question of residential damage. But I conceive that the term *usual* compensation means usual with reference to the nature of the property interfered with, and the manner in which it is affected by the railway; and compensation for residential damage is a usual compensation in those cases where part of the property interfered with consists of a residence, the convenience or the comfort of which is injuriously affected by the company's works. And it appears to me that the £20,000 stipu-

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lated by this contract to be paid to Earl *John* was intended to be over and above every compensation which Earl *John*, or any person beneficially interested in the settled estates, could legally demand from the company, on any account whatever.

Now, let us see whether any light is thrown on the intention of the parties by what took place subsequently to the agreement of the 25th of February, 1845, and before the Railway Act was passed.

On the 10th of October, 1845, a meeting of the provisional committee was held, at which the chairman reported that an arrangement had been made between the old *Churnet* directors and Lord *Shrewsbury* (meaning the agreement of the 25th of February, 1845), which, it appeared to him (the chairman), the railway company were *in honour and good faith* bound to fulfil. Whereupon it was resolved, that the arrangement signed by Mr. *Sharp* and Lord *Shrewsbury* (meaning the agreement in question) be considered binding on *The North Staffordshire Company*. Neither the report nor the resolution states what the consideration was for the £20,000 stipulated to be paid by the contract thus adopted by the provisional committee; but the fact that it was adopted by them, because it was considered that they were bound in honour and good faith to adopt it, is a pretty clear indication that it was not considered as being legally binding upon them.

Seeing, then, that we fail to ascertain either from the agreement of the 25th of February itself, or from the report and resolution of the 10th of October, what the consideration for the £20,000 was, let us see what the Plaintiff alleges in his bill on this subject. In one paragraph it is stated that Earl *John*, as tenant in tail in possession of the settled estates in the year 1845, threatened to oppose the bill unless reasonable and proper terms for the protection of the settled estates could be arranged with the promoters of the bill. On the other hand, the promoters of the scheme, which was exposed to considerable rivalry and opposition, were desirous to secure the countenance and support of so large and influential a landowner as Lord *Shrewsbury;* and in consequence thereof an agreement was entered into on the 25th of February between Earl *John*, on behalf of the settled estates, and Mr. *Sharp*. Then the bill proceeds to state the terms of the contract. So that here we

have the Plaintiff's own statement on the record, that the only inducement which led the promoters to make this contract, containing not only those stipulations onerous to the company for the protection of the estates, but also the stipulation that £20,000 should be paid to Earl *John* was, that they desired to have the countenance and support of so large and influential a landowner as Lord *Shrewsbury*. And notwithstanding all the able and ingenious arguments used for the purpose of inducing the Court to think that this £20,000 was to be paid as compensation for some undefined injury which might be sustained by Lord *Shrewsbury*, and for which the company would have been bound to pay, at least to some extent, it appears to me that the conclusion to be drawn from the contract itself, and from all that took place prior to the actual formation of the company, and from the Plaintiff's own statement, is this—that the £20,000 was to be paid to Lord *Shrewsbury* for his own personal benefit, as the price at which the promoters agreed to purchase his countenance and support in the proceedings they were taking with a view to obtain their Act of Parliament.

Let us now see whether anything that took place subsequently to the formation of the company throws any light on the question of the consideration for the agreement to pay the £20,000. Two acts are referred to which took place after the company was formed. The one was a resolution passed by the directors on the 29th of June, 1846, within a few days after the passing of the Railway Act, by which, after referring to certain agreements and arrangements which had been entered into with certain landowners and others, with a view to and during the application for the Act of Parliament, and, among the rest, the arrangement with Lord *Shrewsbury*, it was resolved that the same be approved, and that the solicitor and engineers be instructed to carry them into effect, and that the common seal be affixed to such agreements as the solicitors advise to be necessary. Nothing is there said as to the particulars of the agreement.

The other act, which took place subsequently to the formation of the company, is the indenture of covenant of the 20th of January, 1848, prepared by a professional gentleman, for the purpose of carrying into effect, so far as could safely be done, the

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contract of the 25th of February, 1845; and in this instrument we find two considerations suggested for the £20,000, viz., 1st, the securing the countenance and support of Lord *Shrewsbury* to the undertaking; and, 2ndly, to meet the expense and inconvenience to which Earl *John* would, by reason thereof, be personally subject. Now, it is impossible not to feel convinced that the second consideration, thus assigned, is a mere conveyancing fiction. The framer of the deed, finding no consideration mentioned in the agreement of the 25th of February, 1845, would naturally inquire what the consideration was, and would be told (as the fact was) that it was to secure the countenance and support of Lord *Shrewsbury;* but he would feel that that consideration, standing alone, would form a very unsatisfactory consideration for £20,000, and, therefore, he cast about for something that would wear a better appearance as a consideration, in case the transaction should come to be challenged in a court of justice, and suggested, as an additional consideration, the expense and inconvenience to which the earl would, by reason of the undertaking, be personally subject. I think it is not too much to assume that the suggestion of this consideration in the deed of the 20th of January, 1848, originated in some such way as this, when it is recollected that it was never before even hinted at, and, moreover, that there is not now, on the part of the company, nor on the part of the Plaintiff, Lord *Shrewsbury*, nor on the part of the representatives of Earl *John*, nor on the part of any other person, any suggestion that there was anything in the shape of expense or inconvenience to which the earl would or could be, by reason of the making of the railway, personally subject. There is not an attempt to shew anything of the kind. And having adverted to what took place subsequently to the formation of the company, merely for the purpose of seeing what light it throws on the question, what was the consideration for the £20,000 agreed to be paid to Earl *John* by the agreement of the 25th of February, 1845, it appears to me the result of the whole case is that the real consideration was, as the Plaintiff himself alleges by his bill, the securing the countenance and support, in lieu of the opposition, of Earl *John* to the railway scheme in its passage through Parliament, and no other consideration whatever.

And to this view I must adhere throughout. I do not say, nor do I mean to insinuate, that the object was to influence the earl's vote in the House of Lords; but it was that he might be converted from an enemy into an ally. I cannot look upon this contract in any other light than that; I cannot suppose there was any other consideration for the agreement to pay the £20,000.

Such being the view that I take as to the consideration for the agreement of the 25th of February, 1845, is there anything illegal in such a contract? Is it illegal for the promoters of a railway to agree with a landowner to pay him £20,000, in consideration of his withdrawing his opposition to the scheme, or of his giving it his countenance and support? I apprehend there is nothing illegal in it; and if Earl *John* were to bring an action against the promoters who contracted with him to recover the amount they contracted to pay, they could not resist the action on the ground of illegality. Nor would it be rendered illegal by the fact that Earl *John* was not merely a landowner, but also a peer of Parliament; for, though that fact might give rise to more or less of suspicion that it was designed to influence his vote, yet, unless such a bargain were proved, the contract could not be impeached. A landowner cannot be restricted of his rights because he happens to be a member of Parliament.

Then comes this question. Is such a contract by the promoters binding on the company when subsequently formed? This is a question which, even if it were untouched by authority, would be one of considerable difficulty. Very cogent arguments present themselves on both sides of the question. In support of the view that contracts of this description between the promoters and landowners ought to be binding on the company, it may be observed that the company owes its existence to the labours and exertions of the promoters. That in order to accomplish the object of procuring the Act of Parliament by which the company is to be formed, and to remove the difficulties and impediments which stand in the way, it is necessary for the promoters to negotiate and arrange with the landowners with respect to various matters relating to the intended operations of the company, and to contract with them, not only that certain works shall be effected in a particular manner, but also that certain sums of money shall be

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paid to them by the company; that without such arrangements and contracts the object of procuring the formation of the company might possibly never have been attained; and that, therefore, it seems only consistent with the principles of honour and fairness and justice that the company, when formed, should be bound to undertake the obligations and responsibilities thus created. Further, it has been urged that the promoters may be considered as standing in the position of agents of the company, and that, therefore, the company ought to be bound by their engagements. And another reason suggested for holding that the company ought to be bound by the contracts of the promoters is this, that (as it is alleged) a committee of either House of Parliament is always averse to introduce into the bill special clauses for effecting particular arrangements with landowners, on the ground that such arrangements may be effected by private agreement between the promoters and the landowner, and it would be unjust to the landowner if, after the Act has passed, such agreement should be held not to be binding on the company.

On the other hand, the arguments for holding that the company ought not to be bound by the engagements of the promoters are not less weighty. It is observed with much truth that it is a fallacy to regard the promoters as standing in the position of agents of the company, inasmuch as they cannot be agents of a non-existing body; nor is there any analogy between their position and that of agents; they are merely persons who, for purposes of their own, are desirous of forming a company to construct a railway; and although it may happen that the promoters themselves become members of the company when it is formed, yet the great mass of shareholders who constitute the company have no connection with the promoters or their acts, and certainly never recognise in them the character of agents of the company. Then, again, there is this strong argument on the same side, that those who become shareholders when the company is formed, take their shares on the faith of what they find in the Act of Parliament constituting the company; that Act, in conjunction with the general Acts on the subject, is the only source from which they can derive a knowledge of the obligations they incur and the advantages they acquire by taking shares; and it would be con-

trary to justice that they should be told after they had taken their shares that they were liable to certain heavy pecuniary obligations, not noticed in the Act, which had been incurred by the promoters in order to induce landowners to support or to abstain from opposing the bill in its passage through Parliament. Another argument against holding the company bound by the contracts of the promoters not sanctioned by the Act, is that the effect would be the misleading of Parliament. When the Legislature is applied to for an Act to sanction the construction of a railway, it has to take into consideration, not merely the benefit of the scheme to the public, but also what sum the work will cost, and with reference to that to fix the amount of capital of the company, and to regulate its borrowing powers. But if the company is to be held liable for all the contracts of the promoters, the calculations upon which the Legislature proceeded in passing the Act might be rendered vain and of none effect, and their intentions defeated by reason of the company being obliged to devote its capital to the discharge of a large amount of pecuniary obligations contracted by the promoters, which were never disclosed during the passage of the bill through Parliament. And this will not appear to be a mere idle apprehension when it is recollected that such cases as that of Lord *Petre* have occurred. And in answer to the argument founded on the alleged practice of committees of the Houses of Parliament to refuse to introduce into the bill clauses relating to particular arrangements between the promoters and the landowners, it may be observed that such practice (if, indeed, it exists) has its origin in the assumption that arrangements of this description will be valid and binding against the company without being sanctioned by the Act; and if the law were only settled otherwise, the practice would of course cease, and committees would not refuse to introduce clauses into the bill to sanction any contracts between the promoters and particular landowners which should appear deserving of that sanction.

Such are some of the leading arguments upon this question considered in the abstract, and supposing it were unaffected by decision. And on that supposition I own that in my opinion it would be most consonant with legal principle, most just, and most

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for the public benefit, to hold that contracts of the promoters with landowners are not binding on the company unless sanctioned by the Act constituting the company.

It remains, however, to consider how the question is affected by authority. We have, on the one hand, in favour of the view that contracts with promoters are binding on the company, the authority of three actual decisions by Lord *Cottenham* in the cases of *Edwards* v. *The Grand Junction Railway Company*, *Stanley* v. *The Birkenhead Railway Company*, and *Lord Petre* v. *The Eastern Counties Railway Company*. In these cases Lord *Cottenham* decided, unquestionably and distinctly, that the contracts of promoters are or may be binding on the company. We have, on the other hand, observations made by learned judges, certainly not overruling the decisions of Lord *Cottenham*, but tending to throw doubt on the propriety of those decisions—I mean Lord *Campbell* and the present Master of the Rolls. In addition to that we have strong expressions of opinion by Lord *Cranworth*, supported by clear and forcible reasoning, in the two cases referred to, of *Preston* v. *The Proprietors of the Liverpool, Manchester, & Newcastle-upon-Tyne Railway Company*, and *The Caledonian Railway Company* v. *The Magistrates of Helensburgh* in favour of holding that the company ought not to be bound by the pecuniary contracts of the promoters, unsanctioned by the Legislature. In the second of those two cases, after having taken time to deliberate upon the matter, in a carefully prepared judgment, His Lordship expressed himself very strongly against the view of Lord *Cottenham* in the three cases to which I have referred, and doubted whether he should not advise their Lordships to declare that those decisions of Lord *Cottenham* were no longer to be considered as law; but he hesitated to do so, from a reluctance to disturb that which had been for a certain time acted upon, and considered to be the law of the land, especially as it was not necessary in that case to call upon their Lordships to pronounce a decision one way or the other upon the abstract question, inasmuch as there the particular contract was *ultra vires* of the company. He held distinctly, and the House of Lords must be taken to have so decided, that Lord *Cottenham's* decision, even supposing it to be right, did not apply

to any contract of the promoters, where the thing contracted to be done was *ultra vires* of the company.

Lord *Cranworth*, in his judgment, points out that in each of the three cases decided by Lord *Cottenham*, however extravagant the bargain might have been, particularly in *Stanley's Case*, where the contract was to give £20,000 for fourteen acres of land, and in *Lord Petre's Case*, where the contract was to give £20,000 for a certain inconsiderable portion of land, and £100,000 for damage sustained; yet, what was to be done was in its nature within the powers of the company. And Lord *Cottenham* himself, in *Edwards* v. *The Grand Junction Railway Company*, points to this distinction.

Now, it appears to me that in the case now before the Court the contract of the 25th of February, 1845, for the payment of the £20,000 to the Earl of *Shrewsbury* is *ultra vires* of the company. I have already said that I cannot hold it to be anything else than a contract to give Lord *Shrewsbury* £20,000 for his countenance and support—the countenance and support of a large and influential landowner. Now it might be that as long as the promoters were before Parliament struggling to accomplish their object of procuring an Act of Parliament, it was well worth their while to pay £20,000 for the countenance and support of a powerful landowner, who, if an opponent, might defeat the project altogether. But when once the Act is passed, what is meant by "the countenance and support of a large and influential landowner?" What is such countenance and support to the company when once formed? It has, indeed, been contended that the countenance and support of Lord *Shrewsbury* was a continuing countenance and support after the passing of the Act and the formation of the company, which it would be competent for the company to purchase. And the question for consideration really resolves itself into this: supposing that in 1848, without any prior agreement between the promoters and Lord *Shrewsbury*, the directors of the company had contracted with Lord *Shrewsbury* to pay him £20,000 in consideration of his giving the company his countenance and support, could such a contract be maintained against the shareholders; or (which is the same thing) could such a contract be maintained if now entered into with the present Plaintiff? Clearly it could not. By the Act of Parliament constituting the

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company, taken in conjunction with the *Companies Clauses Consolidation Act* and the *Railway Clauses Consolidation Act*, the capital contributed by the shareholders is dedicated to the purposes of constructing and maintaining and working a railway; and I am at a loss to comprehend how the countenance and support of a landowner, however influential, and even though he be a member of either House of Parliament, can conduce to the furtherance of either of those purposes; and I am of opinion that neither a resolution of a board of Directors nor the vote of the majority of shareholders at a general meeting, could authorize the application of any portion of the funds of the company to the purchase of such countenance and support, even as against a single dissentient shareholder. Such an application of the funds of the company would be clearly *ultra vires*.

Therefore, even supposing that Lord *Cottenham's* principle, as interpreted by the House of Lords in the before-mentioned case of *The Caledonian Railway Company* v. *The Magistrates of Helensburgh*, is still to be considered as law, namely, that the contracts of the promoters are binding on the company, provided that what is contracted to be done by the company is not *ultra vires*, I am of opinion that the case now before the Court does not come within that principle, because the payment of £20,000 to Lord *Shrewsbury* for his countenance and support is *ultra vires*.

Feeling the impossibility of maintaining that the payment of £20,000 to Lord *Shrewsbury* for his countenance and support, according to the agreement of the 25th of February, 1845, was not *ultra vires*, the learned counsel for the Plaintiff fell back upon this argument: that the deed of covenant of the 20th of January, 1848, ought to be regarded as a new and original contract between the company and Earl *John*, connected with and forming one transaction with the contemporaneous deed relating to the purchase of land by the company, and that the £20,000 was in fact to be paid as part of the consideration for the purchase of that land, and that it was therefore within the scope of the powers of the company to bind itself to the payment of that sum.

I cannot accede to any such argument. In the first place, there is no connection between the two deeds of 1848; the consideration for the land agreed to be taken was fixed and agreed upon by the

contemporaneous deed, and the £20,000 was altogether irrespective of it; and in the next place, so far from the deed of covenant of the 20th of January, 1848, being capable of being regarded as a new and original contract between the company and Earl *John*, it professes, upon its very face, to be a mere adoption and carrying out, in a particular form, of the contract of the 25th of February, 1845, which was the contract of the promoters.

And why did the company enter into this deed of covenant, instead of simply paying the money? Merely because, having regard to the 73rd section of the *Lands Clauses Act*, they apprehended that if they paid the money to Earl *John*, they might possibly be made to pay it over again for the benefit of the successors of Earl *John*, as tenants in tail of the settled estates; and, therefore, they substituted for actual payment the arrangement contained in the deed of covenant of January, 1848.

The only remaining question is, whether the £20,000, contracted by the promoters to be paid to Lord *Shrewsbury*, can be maintained as a liability of the company, on the ground that it comes within the meaning of the term "costs and expenses incurred in obtaining the special Act and all expenses incident thereto," which words occur in the 65th section of the *Companies Clauses Consolidation Act?*" Is the promise to pay £20,000 to Lord *Shrewsbury* for his countenance and support, an expense properly incident to the obtaining the special Act? It seems to me to be quite impossible to put that construction on the 65th section. The effect of so doing would be, that every sum of money, for any purpose whatever, that the promoters might think fit to promise (however unreasonable or unrighteous such promise), in order to get their scheme passed through Parliament, would come within the meaning of expenses incurred in obtaining the Act, or expenses incident thereto.

Upon the whole, I am of opinion that the Plaintiff cannot maintain this bill, and it must, therefore, be dismissed with costs.

Mr. *Rolt* asked that the costs of Earl *John* and Earl *Bertram* should be excepted, as Earl *John* entered into the contract, and the representatives of both the deceased earls claimed the benefit of it.

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Mr. *Osborne* said the executors of Earl *John* did not support the claim; but they submitted that if the Plaintiff should be successful, they should wish to have a clause inserted in the decree to the effect that it was without prejudice to any question as to the rights of the earl.

The VICE-CHANCELLOR said he could make no difference.

The costs of Earl *Bertram* were not asked for by his counsel.

Solicitors: Mr. *Nicholson*; Mr. *Herbert*; Messrs. *Burchell*; Messrs. *Young & Jackson*; Messrs. *Carr & Williamson*.

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CORPORATION OF HYTHE *v.* EAST.

Practice—Breach of covenant—Damages—21 & 22 Vict. c. 27.

The Court has no power under Sir *Hugh Cairns' Act*, upon motion in a cause, after a decree for specific performance of a covenant, to add an order for assessing damages for breach of the covenant.

Such an order would be a supplemental decree upon facts which had subsequently occurred.

THIS was a motion on behalf of the Plaintiffs, that in addition to the specific performance ordered by the order of the 17th of January, 1854 (on the hearing of this cause for further consideration) of the covenant contained in the indenture of the 7th of June, 1851, damages might be awarded to the Plaintiffs for the breach by the Defendant of the said covenant to the present time, and that an inquiry might be directed to assess such damages accordingly.

The suit was instituted for the specific performance of a covenant contained in an indenture dated the 7th of June, 1851, whereby the Defendant covenanted to erect on certain land in the parish of *Hythe* thereby conveyed to him, a building or buildings of the value of £1200.

By an order in the cause dated the 17th of January, 1854, the Defendant was ordered, on or before the 1st of November then

next, specifically to perform the said covenant so far as the same remained to be fulfilled.

After this order, the Defendant proceeded at intervals, and to some extent, with the erection of the buildings; but the Plaintiffs finding that the Defendant was not proceeding with diligence to perform his covenant, presented a Petition to compel him to complete the erection, and an order was made on the 1st of June, 1861, that the Defendant should within six months specifically perform the covenant. This order was duly served upon the Defendant, but he took no steps to obey it until the middle of October, when a few workmen were put on, who continued at intervals to work upon the buildings; but very little progress having been made, the Plaintiffs moved to commit the Defendant for contempt in disobeying the order. The motion was postponed from time to time, on the representations of the Defendant that he intended completing the buildings as soon as possible. He, however, still neglected to do so, and in May, 1864, the Court pronounced an order for committal of the Defendant. Owing to some informality, the order was not drawn up; but before it could have been served, the Defendant had absconded from *Hythe*, and had ever since kept out of the way.

There was an affidavit in support of the motion, shewing that in consequence of the waste and desolate condition of the buildings, and their being in such an unfinished state as to render them most unsightly, and a nuisance and eyesore to the town, the adjoining property belonging to the Plaintiffs (which otherwise would be well adapted for building purposes), remained unbuilt upon, and would continue so if the Defendant's buildings were allowed to remain in their present unfinished and unsightly state. That the state of these buildings had for many years had the effect of decreasing to a very considerable extent the value of the adjoining property belonging to the Plaintiffs, and that the non-performance of the Defendant's covenant had inflicted very great pecuniary loss and damage on the Plaintiffs and the individual members of the corporation, as well as upon the whole town of *Hythe* and the inhabitants thereof. It was also in evidence, that the Plaintiffs had been unable to ascertain the residence of the Defendant, and that all efforts to find him had been unsuccessful.

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Mr. *Baily*, Q.C., and Mr. *Dauney*, in support of the motion, referred to the second section of Sir *Hugh Cairns' Act*, 21 & 22 Vict. c. 27, and submitted that the damage caused by the Defendant arose out of the non-performance of the covenant, and the Court consequently, in addition to directing specific performance of the agreement, had power under the above Act to assess damages. The intention of the Legislature was that the Court of Chancery should have power to give full relief, and not send parties about from one Court to another. In this case it would be necessary to file a supplemental bill in order to obtain the necessary relief, unless the Court could grant relief upon this motion. They referred to *Hindley* v. *Emery* (1), in which Vice-Chancellor *Wood* said, "The intention of the Act 21 & 22 Vict. c. 27, was to give the Court power to grant complete relief wherever it had a well-founded jurisdiction to entertain the case, and not to compel a Plaintiff to seek partial relief in one Court, and then turn him over to another in order to obtain supplemental relief."

The circumstances of this case, arising from the difficulty of proceeding against the Defendant by any other process, rendered it very desirable that this order should be made.

SIR R. T. KINDERSLEY, V.C.:—

I must assume that when the decree was made for specific performance, that decree gave the full measure of relief to which the Plaintiffs were entitled upon the facts then alleged and proved. If it were not so, the remedy would be by a rehearing or appeal. Since the decree, certain facts have occurred from which it is alleged that damage has arisen to the Plaintiffs, and I am asked to put this construction upon the Act,—that it is competent to the Court, on motion after decree, to make an order giving to the Plaintiffs some further relief beyond what they were entitled to have at the time when the decree was made; that is, in other words, that the Court may make a supplemental decree on motion in the cause, on facts which have happened subsequently to the decree. That cannot be the right construction of the Act. It is said that the Court will not be doing complete

(1) Law Rep. 1 Eq. 52.

justice unless it makes the order now asked for. But it must be recollected that before this Act the Court of Chancery had no power to give damages at all; and although the Act has given the Court power in certain cases in making a decree, to give damages upon the facts then alleged and proved, it could not have been intended to give the Court power to make an order on motion, which would in effect be a supplemental decree founded on what has occurred since the decree was made.

Motion refused.

Solicitors: Messrs. *Kingsford & Dorman.*

PIFFARD v. BEEBY.

Practice—Interrogatory—Documents—Exceptions—Affidavit.

A Defendant may decline to answer the usual interrogatory as to documents. It is sufficient if he expresses his willingness to make the affidavit prescribed by the new practice, and it makes no difference whether the exception as to documents is a single exception or is included among others. But if a Defendant professes to answer the interrogatory he must do so fully.

The introduction of interrogatories as to documents should now be avoided.

THIS case came on upon exceptions to an answer.

There were nine exceptions, six of which were allowed upon grounds not requiring a report; the other three exceptions were on the ground that the Defendants had not sufficiently answered the interrogatories as to documents which required the Defendants to set forth in a schedule all books, papers, and documents in their possession, relating to the matters in the bill mentioned. To these interrogatories the Defendants answered that they were ready to make the usual affidavit as to documents in their possession, and to produce the same when required to do so according to the practice of the Court.

The exceptions were that the Defendants had not answered the interrogatories; that they had not set out a schedule of the documents required; and that they had not in a schedule distinguished the particulars of such documents.

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Mr. *Baily*, Q.C., and Mr. *Renshaw*, in support of the exceptions, submitted that the Defendants had not sufficiently answered the interrogatories. They cited *Reade* v. *Woodrooffe* (1), where the Master of the Rolls held that if a Defendant answer, he must answer fully.

Although the Plaintiffs might have obtained production by means of an affidavit upon summons under the new practice, there was nothing to prevent them from requiring a list of documents to be set out in a schedule, by which course the further expense and trouble of proceedings in Chambers would be avoided.

Mr. *Cust*, for the Defendants, contended that since the new orders had been introduced, it was the universal practice never to answer the interrogatory as to documents. It was now sufficiently answered by the form used in this answer, that the Defendants were willing to make the usual affidavit to produce the documents when required to do so according to the practice of the Court. The course now adopted of making an affidavit as to documents was a less expensive form of proceeding, and it was no answer to say that because exceptions were taken to other portions of the answer, the Plaintiffs might also except for documents.

In the case of *Law* v. *The Indisputable Life Insurance Company* (2), Vice-Chancellor *Wood* said he should hope that exceptions to answers on the ground of the interrogatory as to books and papers not having been sufficiently answered, would not hereafter be generally taken in such cases, though in the particular case before him His Honour thought there might be some ground for the exception. In that case the exception was one of other exceptions. In *Perry* v. *Turpin* (3), Vice-Chancellor *Wood* held that it was not necessary now in every case to insert a charge of documents in a bill as a foundation for the usual interrogatory concerning them, and His Honour observed that he disliked extremely these exceptions as to documents, when the discovery could be easily obtained at Chambers under the new practice. And in *Kidger* v. *Worswick* (4) Vice-Chancellor *Wood* said he considered it right not to encourage exceptions as to documents; the case was one of simple interroga-

(1) 24 Beav. 421.
(2) 10 Hare, app. 20.
(3) Kay, app. 49.
(4) 5 Jur. (N.S.) 37.

tory only; there was nothing special in its terms, and the form of affidavit in Chambers would give to the Plaintiff as large a security against fraud as an answer to the interrogatory would give. He therefore refused to make any order upon the exceptions.

Mr. *Baily*, in reply.

SIR R. T. KINDERSLEY, V.C.:—

With regard to the general view of this question, I concur with the Vice-Chancellor *Wood*. Formerly the only mode of getting discovery was by a charge and interrogatory in the bill; but a new practice has been introduced for obtaining production of documents in a summary way by summons in Chambers; and there is this advantage in its being done by that mode—that any questions arising as to the sufficiency of the discovery are discussed and dealt with in a cheaper and more summary form in Chambers than by means of formal exceptions brought into Court for argument; and other advantages might be suggested as resulting from the new practice.

I must say I think that the new practice ought to be observed, both by the draftsman who draws the bill and interrogatory, and by the draftsman who draws the answer. It would be better that there should be no interrogatory as to documents. There is no use in it whatever. And if there be such an interrogatory, it would be better that the Defendant should not answer it. That is equally useless, for if the Defendant takes that course and omits to answer the interrogatory, except by saying that he is ready and willing to make the usual affidavit as to documents, then I think, consistently with the view taken by Vice-Chancellor *Wood* and the reasoning founded on the change of practice, he is justified in not answering it, and no exception on the ground of his not having answered it ought to be allowed. But if the Defendant thinks fit to answer it, and professing to answer it, answers it insufficiently, then I think the Plaintiff ought to have the right to except. I confess I do not see the difference in principle between the case where such an exception is the only one, and the case where it is one of many. In either case I think that where the Defendant has altogether omitted to answer the interrogatory, the exception

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ought to be overruled; and where he has professed to answer it, but has answered insufficiently, the exception ought to be allowed. It is true there is no decision, that I am aware of, to the effect that if there be other exceptions the Plaintiff may not except on the ground that the Defendant has omitted to answer the interrogatory for production of documents; but the Vice-Chancellor *Wood* has shewn what his view of the general subject is, and I think I am following out that view by overruling these three exceptions.

Solicitors for the Plaintiffs: Messrs. *Walters & Gush.*
Solicitors for the Defendants: Messrs. *Taylor, Mason, & Taylor.*

V.-C. K. 1866 *March* 9, 10.

SMITH *v.* WHITE.

Immoral purpose—Brothel—Assignment.

A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee which was being administered:—

Held, that the assignment, and every thing arising out of it, was so tainted with the immoral purpose, that the Plaintiff could not recover.

THE question which arose on this adjourned summons was as to the validity of a debt claimed by the Plaintiff, from the Defendant, *James White*, as executor of *Edmund John Lacey*.

The Plaintiff, *Henry Smith*, was lessee under a lease granted in 1843, by the Marquis of *Exeter*, for a term of twenty-one years, at the yearly rent of £150, of the *Fountain Tavern*, in *Catherine Street, Strand*. This lease contained a covenant to repair and yield up the premises in good repair at the end of the term, and also a covenant not to suffer the house to be used as a brothel, &c., during the term thereby granted.

In December, 1845, the Plaintiff agreed to sell the lease of the *Fountain*, with furniture and fixtures, to *Lacey*, for £1400; but

as *Lacey* had not sufficient capital, in order to secure the unpaid purchase-money the agreement was carried out by means of an underlease, the rent reserved for the first four years (in addition to the £150 a-year) amounting to £1400, and interest, which included furniture, &c., to the value of £1000, and £150 the cost of repairs. This underlease contained an express covenant that the premises should not be used as a brothel, and also a proviso for re-entry by *Smith*, on default in payment of rent or on breach of covenant by *Lacey*. It also contained a covenant on the part of *Smith*, that if *Lacey* should duly pay the rent reserved during the first four years of the term, then *Smith* would assign the premises to *Lacey* for all the residue of the term granted by the original lease. The underlease then contained a recital, that Bills of Exchange should be given to *Lacey* as a collateral security, and a covenant by *Smith*, that in the event of the demise thereby made being avoided before the bills had become due and payable, he would keep *Lacey* indemnified against payment of such parts of them as should fall due after the avoidance of the demise.

The rent reserved during the four years having been paid, *Smith*, by an indenture dated in March, 1850, assigned to *Lacey*, the premises in question for all the residue of the term granted by the lease of 1843; and this assignment contained a covenant on the part of *Lacey*, to pay the rent and observe and perform the lessee's covenants contained in the original lease, and to save, defend, keep harmless, and indemnify the said *Henry Smith* of and from the same, and the payment, and observance, and performance thereof, respectively.

On the termination of the term granted by the lease of 1843, the Marquis of *Exeter* applied to *Lacey* for £65, for dilapidations under the covenant contained in the lease, but *Lacey* not paying that amount, he applied to, and compelled, the Plaintiff to pay that sum, under a threat of proceedings; and the Plaintiff having paid it, now sought to have it repaid to him from the estate of *Lacey*, who had died, in accordance with the indemnity clause in the assignment to *Lacey*.

The evidence went to shew that the rent of the house was very much larger than the house was worth for ordinary purposes. The Plaintiff in his examination swore that he derived no benefit

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from the purposes for which the house was used, but declined to swear that he did not know that it was used for an immoral purpose. It will be seen from the judgment that upon the evidence the Court arrived at the conclusion that the house had been used as a brothel for many years, and that the Plaintiff was aware of that fact, and knew that *Lacey* intended to continue so to use it.

Mr. *Baily*, Q.C., and Mr. *D. Jones*, for the Plaintiff:—

The debt claimed is a valid debt, and is not affected by any immoral purpose. The lease having been assigned, the assignee is bound to perform all the covenants in the assignment, and one of those covenants is to indemnify the assignor against all the covenants in the original lease; and the present claim arises upon one of those covenants. This is not a case of lessor and lessee, or that of a person supplying goods for an immoral purpose; but here *Smith* having assigned the lease to *Lacey*, he had no longer any control over or interest in the user of the premises.

There being a joint liability to pay for the dilapidations, first on the assignee, and, on his default, on the original lessee, the money has been paid by the original lessee for the use of his assignee, and at his request, and as such would be recoverable by him from the assignee in an action at law.

They referred to *Burnett* v. *Lynch* (1), *Wolveridge* v. *Stewart* (2).

Mr. *Glasse*, Q.C., and Mr. *Barnard*, for the Defendant:—

This debt is so tainted with the immoral purpose, that it cannot be recovered either in equity or at law. There can be no doubt from the evidence that *Smith*, when he assigned the premises to *Lacey*, knew well the purpose for which *Lacey* took the assignment. The rent given for the premises and the price paid are alone sufficient to shew the purpose for which the premises were to be used. The whole transaction, therefore, and everything arising out of it, is so tainted with the immoral purpose, that no claim arising out of it can be recovered in any Court of justice. It matters not whether the purpose is immoral or illegal.

The principle applicable to the case of one paying money for

(1) 5 B. & C. 589. (2) 1 C. & M. 644.

another's use at his request does not arise here; there being no such privity between the parties as would enable the Court to imply a promise.

They referred to *Jennings* v. *Throgmorton* (1); *Bowry* v. *Bennet*, and note to that case (2); *Gaslight & Coke Company* v. *Turner* (3); *Fisher* v. *Bridges* (4); *Collins* v. *Blantern* (5); *Girardy* v. *Richardson* (6); *Ritchie* v. *Smith* (7); *Paxton* v. *Popham* (8); *Reg.* v. *Rice* (9); *Willyams* v. *Bullmore* (10); *Houle* v. *Baxter* (11); *Pownal* v. *Ferrand* (12); *Walker* v. *Perkins* (13); *Bartlett* v. *Vinor* (14).

Mr. *Baily*, in reply:—

The present case differs from all the cases which have been cited; the immoral purposes being in all of them part of the contract. But that is not so in the present case; *Smith* having absolutely assigned the lease to *Lacey*, had no further control over the premises. The claim, in fact, arises out of the original lease; the liability to such claim, it is true, arises out of the assignment, but it cannot be said to have formed part of the contract.

SIR R. T. KINDERSLEY, V.C.:—

It appears to me impossible to hold that the Plaintiff is a creditor of *Lacey*, his claim arising out of an illegal transaction; that is, a transaction which was intended to carry into effect an immoral purpose.

The evidence shews that for the last forty years the house in question has been used as a brothel by the persons who have been successively lessees or occupiers thereof; and I conclude from the evidence that the Plaintiff, when he granted the lease to *Lacey*, and agreed to assign, and also when he assigned, the premises to *Lacey*, perfectly well knew that the house had long been so used,

(1) Ry. & Mood. 251.
(2) 1 Camp. 348.
(3) 6 Bing. N. C. 324.
(4) 2 E. & B. 118; S. C. 3 E. & B. 642.
(5) 1 Sm. L. C. 5th ed. 310.
(6) 1 Esp. 13.
(7) 6 C. B. 462.
(8) 9 East. 408.
(9) Law. Rep. 1 C. C. 21.
(10) 33 L. J. (Ch.) 461.
(11) 3 East. 177.
(12) 6 B. & C. 439.
(13) 3 Burr. 1568.
(14) Carth. 251.

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and that it was intended by *Lacey* to be used for the same purpose. Knowing all this, he assigned his lease over to *Lacey*.

Now, it appears to me that the authorities clearly shew that out of such a transaction as this no legal right can be created; and that no action would lie for the rent, or for the breach of any of the covenants, or for anything else arising out of the transaction. The case most nearly in point is that of *Jennings* v. *Throgmorton* (1), where rent was sought to be recovered for lodgings let to a prostitute on a weekly tenancy. In that case it signified nothing to the lessor whether the woman carried on the business of a courtezan or any most proper business, provided only she paid her rent; and the only difference between that case and the present is, that in that case there was a weekly tenancy, so that the lessor might at any time have determined the tenancy without the impediment of any existing lease; but knowing the purpose for which the woman hired the lodgings he continued to let to her; and it was held that the contract was so tainted with immorality that the Plaintiff could not recover.

Another case cited is also in point, namely, *Bowry* v. *Bennet* (2), where the Plaintiff knew that the articles of dress supplied by him to the Defendant were intended to be used by her in carrying on her vocation of a prostitute; and it was held that he could not recover.

It cannot be doubted that in the present case the Plaintiff knew that the means of paying the high rent which was to be paid by *Lacey* for the premises would be derived from the profits of the immoral trade to be carried on in the house; and although he had no lien on those profits, he expected to be paid out of them, and knew that unless *Lacey* carried on such trade he would not be able to pay the rent.

It has been argued, on the part of the Plaintiff, that his claim is not a claim for rent, but for money which *Lacey* ought to have paid, and which the Plaintiff has been forced to pay under his covenant with the Marquis of *Exeter* contained in the original lease; and that it is in effect money paid by Plaintiff to the use of *Lacey*, which ought to be repaid to him out of *Lacey's* estate. But it appears to me that this claim arises just as much out of

(1) Ry. & Mood. 251. (2) 1 Camp. 348.

the immoral contract, and is just as much affected by the taint of immorality as a claim for rent.

I am of opinion that every right and obligation arising out of this contract is affected by the taint of immorality, and, therefore, that the Plaintiff cannot be regarded as a creditor of *Lacey*.

Solicitors for the Plaintiff: Messrs. *Johnston & Jackson*.

Solicitors for the Defendant: Messrs. *Walter & Moojen*.

M. R.

1866

March 10, 12.

In re BIRMINGHAM BLUE-COAT SCHOOL.

Investment—Cash under the control of the Court—Direction in private Act to invest in Exchequer Bills—23 & 24 Vict. c. 38 s. 10—General Order 1st of February, 1861, rule 1.

The Court may, under 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, rule 1, order the investment in Consols of money paid into Court under a private Act, although such private Act directs the investment to be in Exchequer Bills.

By a private Act of Parliament (8 & 9 Vict. c. 27) regulating the management of the estates of the *Blue-Coat School Charity* in *Birmingham*, the trustees were empowered to sell clay, sand, and gravel, which it should be necessary to remove from the charity estates, and the Act directed that the money to arise from such sale should be paid into Court, and should in the mean time, until otherwise applied in pursuance of the Act, be from time to time laid out in the purchase of Navy, Victualling, or Exchequer Bills, and that the interest arising from the money so laid out and the money received for the bills as they should be respectively paid off should be laid out from time to time in the purchase of other Navy, Victualling, or Exchequer Bills, and that the money so paid into Court should, after payment of certain costs, be laid out in the purchase of freehold hereditaments within or near the borough of *Birmingham*, to be conveyed to the trustees for the general purposes of the charity.

The trustees having sold some clay, sand, and gravel, and paid the proceeds (£2895) into Court, presented this Petition for the investment of the £2895 in Consols, and the payment of the dividends to the trustees for the time being.

Mr. *Speed*, for the Petitioners, submitted that the money in question was "cash under the control of the Court," within the meaning of the 10th section of the 23 & 24 Vict. c. 38, and the 1st rule of the General Order of the 1st of February, 1861, made under that section, and that consequently the Court could, not-

withstanding the provision of the private Act, order the investment to be made in Consols.

Lord Romilly, M.R. :—

I am inclined to think that the statutory power of the Court as to investment conferred by the 23 & 24 Vict. c. 38, was intended to apply only to cash coming into Court in the ordinary course, and not to money paid in under an Act of Parliament, which contains an express provision as to the mode of investment; but I will consider it further, and I should wish you in the mean time to ascertain whether there is any authority upon the subject.

March 12. Mr. *Speed* said that he had not been able to find any reported decision, but he had been informed that in a case of *Re Mitford's Estate* (1), under a private Act containing a similar provision, Vice-Chancellor *Wood* had ordered a small sum, which remained in Court after a re-investment in land, to be invested in Consols.

Mr. *Dickinson, amicus curiæ*, confirmed the statement, but said that the question was not argued in that case.

Lord Romilly, M.R. :—Nevertheless, I will act upon that authority if you can produce it to the Registrar.

Mr. *Speed* :—The Act directs the interest of the Exchequer Bills to be invested, together with the money received when the Bills are paid off, to be invested in other Exchequer Bills, but that provision appears to be inapplicable to an investment in Consols, which is an investment of a more permanent nature; the Petition therefore asks for the payment of the dividends to the trustees.

Lord Romilly, M.R. :—I think that is right.

Note :—The order in *Re Mitford's Estate* being exactly in point, the order was drawn up accordingly.

Solicitors : Messrs. *Taylor, Hoare, & Taylor.*

(1) Jan. 13th, 1866.

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SHARP *v.* WRIGHT.

Practice—Chambers—Costs of Receiver's Accounts—Solicitor appearing for two parties.

When a Receiver, appointed in a suit, passes his accounts in Chambers, and the same solicitor appears both for the Receiver and one of the parties to the suit, only one copy of the account can be allowed between them on taxation.

In this suit, which was instituted for the administration of an estate, a Receiver had been appointed, and the Plaintiff's solicitor acted also as solicitor to the Receiver. By the order of the Judge in Chambers, the solicitors for some of the residuary legatees attended the passing of the Receiver's half-yearly account, which consisted of upwards of 1300 items.

A question arose on the Receiver's costs of passing his account as to the allowance of a second copy of the account for the Plaintiff's solicitor, besides the one which he had as solicitor for the Receiver, the cost of each copy being £8. The question was referred by the chief clerk to the Master of the Rolls, who submitted to the taxing masters of the Court, first, whether in taxing the accounts of a Receiver, the taxing masters allowed a copy to be taken by the Plaintiff, when the same solicitors were properly employed by the Plaintiff and by the Receiver; secondly, whether in taxing the costs of proceedings in a suit where the same solicitors were properly employed for the Plaintiff and Defendant, it was the practice to allow copies to be taken by either party of documents brought into Chambers by the other side.

To these questions the taxing masters returned the following answers:—

1. "The costs of passing a Receiver's account so seldom come into this office, that there cannot be said to be any practice with us expressly relating to such costs.

"We are unable to discover any reasons which should except copies of a Receiver's account from the general rule, that a

solicitor concerned for two or more parties is not allowed to charge for supplying to himself copies of documents which he has himself prepared, and we are of opinion that a charge for a copy of the Receiver's account for the Plaintiff, the same solicitor being concerned for the Receiver and the Plaintiff, ought not to be allowed.

2. "It is not the practice of the taxing masters, in taxing the costs of proceedings in a suit where the same solicitor is concerned both for Plaintiff and Defendant, to allow copies to be taken by either party of documents brought into Chambers by the other side.

"We are unable to point out any exceptions to this rule.

(Signed)

"R. W. FOLLETT.
"RICHARD MILLS.
"JOHN WAINEWRIGHT.
"RICHARD BLOXAM.
"A. H. SHADWELL.
"C. F. SKIRROW."

The case was, by the direction of the Master of the Rolls, adjourned from Chambers into Court.

Mr. *Jessel*, Q.C., and Mr. *Smart*, appeared for the solicitor for the Plaintiff and Receiver.

Mr. *Swanston*, for the Residuary Legatees, was not called on.

LORD ROMILLY, M.R.:—

I am of opinion that when the same solicitor appears for the Plaintiff and Receiver, two copies of the account ought not to be allowed, and I therefore direct that one copy only of the Receiver's account be allowed, as between the Plaintiff and Receiver.

Solicitors for the Petitioner and Receiver: Messrs. *W. & H. P. Sharp.*

Solicitors for the Residuary Legatees: Messrs. *Graham & Lyde.*

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ATTORNEY-GENERAL *v.* SITTINGBOURNE AND SHEERNESS RAILWAY COMPANY.

Specific performance—Petition to enforce Vendor's lien—Right of Incumbrancers not parties to the suit.

Where a decree had been obtained by a vendor against a railway company for specific performance of a contract for sale, in which inquiries were directed to ascertain the amount due for damages and costs, and the amount, when found due, together with the purchase-money, was ordered to be paid, but was not declared to be a charge on the land:—

Held, that the vendor was not entitled, under the liberty to apply, to enforce by Petition a lien on the land for the sums due, especially as there were incumbrancers not parties to the suit, whose rights would be affected by such lien.

THIS was a Petition presented by the Attorney-General on behalf of the Crown under the following circumstances:—

By an agreement entered into in 1858 between the Commissioners of Woods and Forests and the *Sittingbourne & Sheerness Railway Company*, the company agreed to purchase certain land for the purposes of their railway, giving other land in exchange; or, if unable to effect the exchange, the company agreed to pay £2000 as purchase-money.

About the date of the agreement the company entered into possession of the land comprised in the agreement, but were unable to complete the exchange, and failed to perform their part by paying the purchase-money.

A suit was instituted, by way of information, by the Attorney-General against the Company to enforce specific performance of the contract; and by the decree made in January, 1864, it was declared that the agreement entered into ought to be specifically performed; that the Defendants ought to pay to Her Majesty the sum of £2000 by way of purchase-money and for severance; and £500 for liquidated damages, subject to certain inquiries. Inquiries were directed whether certain works mentioned in the agreement had been executed, and, if not, what compensation ought to be paid by the Defendants, with directions for the payment of costs, and liberty to all parties to apply.

The Defendants made default in payment of the sums so ordered to be paid by the decree.

Previously to the filing of the information, in 1863 a suit of *Skinner* v. *Sittingbourne & Sheerness Railway Company* was instituted by the mortgage creditors of the railway company, under which a receiver was appointed; and, by a decree made in January, 1864, the Plaintiffs in the last-mentioned suit were declared entitled to a charge on the tolls of the company.

The railway had, before the decree of January, 1864, been leased to the *London, Chatham, & Dover Railway Company*, who were now in possession and conducting the traffic. Neither the mortgage creditors nor the lessees were parties to the suit for specific performance.

The Petition stated that the Attorney-General conceived that it was not practicable by writ of sequestration to compel the Defendants to obey the decree of January, 1864, and prayed that the Defendants might be ordered to pay to the Commissioners of Woods and Forests, on behalf of Her Majesty, the several sums due, with interest and costs; and that, in default of payment, the land taken from the Crown might be sold.

Mr. *W. M. James*, Q.C., and Mr. *Pemberton*, for the Petitioner:—

The Crown is entitled to a lien on the land taken by the Defendants for the unpaid purchase-money, notwithstanding that a railway has been constructed over it. In the case of *Walker* v. *Ware, Hadham, & Buntingford Railway Company* (1), it was held that the owner of land taken by a railway company was entitled to a lien for the purchase-money and for compensation, and that the Court would enforce the lien by sale, though the railway was constructed and in use. The present Petition only asks for an order in this suit which will not affect the rights of the creditors or of the lessees of the line. The Crown has the legal estate and the first equity, and is entitled to enforce the decree, as prayed by the Petition.

Mr. *F. H. Colt*, for *R. F. Skinner*, and *F. Dumergue*, the Plaintiffs in the suit of *Skinner* v. *Sittingbourne & Sheerness Railway Company*:—

The information was not registered as a *lis pendens*; it was only

(1) Law Rep. 1 Eq. 195. 35 Beav. 52. 12 Jur. N.S. 161.

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a suit for specific performance to which the incumbrancers were not parties. If a decree for specific performance is obtained against an insolvent Defendant, that does not entitle the Plaintiff to take proceedings by Petition which will affect the rights of other incumbrancers. No lien can be enforced under such a decree; it does not come within its scope, nor is the Petition a proper proceeding within the liberty to apply. Besides, the Petition seeks to enforce a lien not only for the purchase-money but also for damages, costs, and other collateral matters. On these grounds the order prayed for cannot be granted.

Mr. *Bevir*, for the Defendants, the *Sittingbourne & Sheerness Railway Company*:—

The Crown cannot enforce this lien on Petition. It should have been asked for in the first instance in the suit, if at all. The Crown has the usual remedy of sequestration.

Mr. *Baggallay*, Q.C., and Mr. *Kekewich*, for the *London, Chatham, & Dover Railway Company*:—

The Petition asks first for a lien, and then, in effect, for a declaration of the priority of the Crown; for if the money is not paid the land is to be sold on which the railway is constructed, which is under lease to the *London, Chatham, & Dover Railway*. The order is asked for on Petition against this company, which is not a party to any suit whatever. In *Walker* v. *Ware, Hadham, & Buntingford Railway Company* (1), the lien was asked for in the first instance in the bill, and so it might have been in the first instance here. It might, possibly, be enforced as against the Defendants now, but not as against the lessees of the line, whose right accrued before the decree was made, and against whom no right can be enforced merely by service of this Petition. As against the lessees, therefore, the Petition should be dismissed with costs.

Mr. *W. M. James*, in reply.

Feb. 12. LORD ROMILLY, M.R.:—

I think this Petition is misconceived. It is, in fact, presented

(1) Law Rep. 1 Eq. 195, 35 Beav. 12 Jur. N.S.

for the purpose of enforcing a lien which has not hitherto been declared by the decree of the Court. It is true that a purchaser has a lien for his unpaid purchase-money, but he cannot, if he require the aid of the Court, act differently from a mortgagee or any other person claiming a lien; he must institute a suit, and get that lien declared against all the persons interested in the estate, or at least all those who are subsequent to him in date, and who are foreclosed by his decree. But if I were to make this order permitting or directing the sale of this property, I should not only be giving to the Petitioner, on behalf of the Crown, the benefit of a lien which has not been established by any proceeding in this Court, but I should be doing so against Respondents who hitherto have had no opportunity of contesting the case of the Petitioner or the amount of the debt which he claims to be due to him.

In this case the decree which has been made simply directs specific performance, and payment of various sums to be ascertained, six months after the certificate of the chief clerk; but the Court does not declare that this amount is a charge upon the property sold; and part of that amount, as it appears to me, cannot, consistently with the ordinary rules, be supposed to constitute a lien upon the property—I mean that part of it which consists of damages to be estimated as due from the railway company in respect of certain works which were not executed, which would appear to be a debt, and not a charge on any of the property sold, unless it had been so expressly declared. I mention this, not for the purpose of expressing any opinion upon the subject, but for the purpose of shewing the difficulty I should have if I were to enter into this question now without the proper materials, and with Respondents not properly instructed to meet the case.

If the Petitioner on behalf of the Crown claims a lien upon the estate, or on the piece of land so sold, it would be necessary, before I could direct the sale of it, to have a decree declaring the amount of that lien, that decree being made in the presence of persons who claim subsequent charges upon the property, and also the person claiming the equity of redemption of the property itself.

Even assuming that the decree obtained had established that the Petitioner is right, and is entitled to a lien or charge upon this property, and that the amount had been ascertained, neither the

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Plaintiffs for whom Mr. *Colt* appeared, nor the *London, Chatham, & Dover Company* were present at the taking of the accounts, though both of them are materially interested in disputing the amount claimed; and if I directed a sale, I should, in fact, without a suit and without a decree for that purpose, be giving priority to the charge of the Crown over the other charges, and foreclose them by directing the purchase-money to be paid to the Petitioner on behalf of the Crown without the others having had any opportunity, not merely of contesting the right of the Petitioner, but of contesting the extent of that right.

Whatever remedies are open to the Petitioner upon a decree, by sequestration or otherwise, he is entitled to adopt, and he does not want the help of this Court for that purpose; but if the Court is to go beyond that, he must file a bill in the usual way against the proper parties to enforce the lien and to get the benefit of it; the consequence of which is that I must dismiss this Petition with costs as against the Plaintiffs in the creditors' suit, and the *London, Chatham, & Dover Railway Company*, so far as the practice of the Court sanctions it in a Petition on behalf of the Crown, and without costs as against the Defendants.

MINUTES:—Order that the Petition stand dismissed, and that the costs of the *London, Chatham, & Dover Railway Company*, and of *R. F. Skinner*, and *F. Dumergue*, be taxed and paid to them in the manner directed by the Act 18 & 19 Vict. c. 90.

Solicitor for the Petitioner: *Solicitor of Inland Revenue.*

Solicitors for the Respondents: Mr. *R. H. Peacock;* Messrs. *Eyre & Lawson;* Messrs. *Freshfields & Newman.*

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Feb. 28; *March* 13.

Vendor and Purchaser.—Specific performance—Trust for Sale—Legacy or Succession Duty—Certificate—Succession Duty Act, 1853, *s.* 51.

Where trustees for sale under a will, who have entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vest the estate in the person to whom (subject to the trust), the land is devised, whereby he becomes the proper party to convey, such legacy duty is properly paid, and no new contract is created whereby succession duty becomes payable.

A certificate from the *Inland Revenue Office*, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no particular form of certificate can be required by a purchaser under the *Succession Duty Act*, 1853, *s.* 51.

THIS was a suit for the specific performance of a contract entered into by the Defendant with the Plaintiffs, for the purchase of certain lands at *Hagley*, being a portion of the hereditaments in *Staffordshire* devised by the will of the late Hon. *Robert Curzon*.

The testator, by his will, devised his lands, in the county of *Stafford* (subject to a mortgage for £12,500), unto and to the use of the Plaintiffs, *Earl Howe* and *W. S. Dugdale*, in fee, upon trust, by mortgage or sale of all or any part of the testator's real estate in the county of *Stafford*, to raise the sum of £20,000; and if such sum should be raised by any sale, such sale might be either free from, or subject to, the said principal sum of £12,500 and interest, and the trustees were authorized to raise, by means of the trusts for sale before declared, such further sum as might be necessary to pay off the said sum of £12,500; and, upon further trust, to execute such conveyances and assurances as they should deem necessary to make any such sale as aforesaid; and the testator declared that, subject to the said trusts, the estates in the county of *Stafford* should be in trust for his son the Plaintiff, *Robert Curzon*.

The testator died in 1863, and in the same year the trustees under the trusts of the will put up the *Hagley* Estate for sale in lots, and the Defendant was declared the purchaser of the lands comprised in Lots 2 and 15. At that time no part of the sum of

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£12,500, due on mortgage, or of the sum of £20,000 had been raised, and the sale was made for the purpose of raising those sums.

In 1864 the mortgage money, and also the sum of £20,000, were paid by the trustees out of the purchase-money of other parts of the *Hagley* Estate, and of other lands subsequently sold, and the mortgagees, by the direction of the trustees, reconveyed the hereditaments so mortgaged to them, to the Plaintiff, *R. Curzon.*

The title was accepted by the purchaser, except as to the question of the proper duty payable in respect of the land purchased, referred to in the following requisition by his solicitors:—

"As Mr. *R. Curzon* is now to be treated as vendor, by virtue of his beneficial interest under the will of his father, it must be proved by the usual evidence that the succession duty has been paid."

To this the Plaintiffs' solicitors replied:—

"The devise upon trust for sale was absolute, and we therefore submit that legacy, and not succession duty, is payable."

A long correspondence ensued, and on the 22nd of April, 1865, the Plaintiffs made a formal tender to the Commissioners of Inland Revenue of the amount payable on the death of the testator for succession duty in respect of the land sold to the Defendant, but the commissioners declined to receive the same, on the ground that legacy, and not succession duty, was payable.

The Plaintiffs, therefore, paid the sum of £51 19*s.* 8*d*, being legacy duty on the amount of the purchase-money of the land purchased by the Defendant, and obtained a proper receipt.

The Defendant's solicitors having still declined to complete, a letter agreed upon by both parties was addressed by the Plaintiffs' solicitors to Mr. *Trevor*, the Comptroller of Legacy and Succession Duties, which, after stating the circumstances and the contention of the parties as to the proper duty, requested a receipt for succession duty, if that were payable, or a certificate that the land was free from duty if the duty had been properly paid.

To this Mr. *Trevor* sent the following certificate or letter, of the 29th of May, 1865 :—

"I beg to acknowledge your letter of the 17th instant, and to observe that legacy duty appears to have been properly paid, under the 4th and 5th sections of 45 Geo. 3, c. 28, for the proceeds of the sale of the real estate sold under the directions contained in the will of the late Hon. *R. Curzon*, and, being so paid, there is no charge on the property so sold, under the 16 & 17 Vict. c. 51."

The Defendant's solicitors considered this to be unsatisfactory, as being based on the hypothesis that the Defendant was purchasing under the trusts of the will, instead of directly from the Plaintiff, *R. Curzon*.

On the 20th of June they addressed a letter to Mr. *Trevor*, requesting to be furnished with a certificate that the land about to be conveyed was free from duty, and enclosed a form of certificate to that effect. In reply Mr. *Trevor* sent the following letter or certificate, dated June 21st, 1865 :—

"In reply to your letter of the 20th instant, I beg to state that the duty, at the rate of £1 per cent., amounting to £51 19*s.* 8*d.*, appears to have been paid upon a sum of £5198 11*s.* 6*d.*, described to be the proceeds of the sale of the following property" (describing the land comprised in the contract), "being part of the *Staffordshire* Estates of the late Hon. *R. Curzon*, and which are devised to his son, *R. Curzon*."

The Defendant contended that this was insufficient, and declined to complete the contract unless succession duty was paid. The Plaintiffs accordingly filed their bill, praying that the contract might be specifically performed.

Mr. *Selwyn*, Q.C., and Mr. *G. Osborne Morgan*, for the Plaintiffs :—

The legacy duty, amounting to £51 19*s.* 8*d.*, on the proceeds of the sale of the land, was properly paid by the Plaintiffs. The Defendant alleges that, in consequence of the legal estate having been conveyed to *R. Curzon*, from whom the conveyance would now be made to the Defendant, succession duty becomes payable,

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but no subsequent dealing with the legal estate, after the contract has been entered into, can affect the right of the Crown in respect to the duty; and one duty having been paid, no other is payable, for the 18th section of the "*Succession Duty Act*, 1853," provides that "no person charged with the duties on legacies and shares of personal estate, under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property." It is now immaterial which is the proper duty, for that was a question to be decided on the death of the testator, or at the time of the contract. Even if succession duty were now payable, it would be a charge on the purchase-money under the 29th section, not on the land. It is impossible to say that this is not a sale under the trust because the legal estate has been conveyed to Mr. *Curzon*, for after that conveyance the purchaser could have obtained a decree for specific performance against the trustees, without making Mr. *Curzon* a party. A case has been submitted to Mr. *Trevor* in which both parties concurred, and his certificate is sufficient; but, apart from that, the Crown is precluded, by receiving legacy duty, from claiming any other.

Mr. *Hobhouse*, Q.C., and Mr. *Cecil Russell*, for the Defendant:—

The first question is whether succession duty is payable in respect of the land; for if so, it is the duty of the vendors to procure a certificate that it is properly paid, which they have not done. In order to shew that legacy duty was payable, the Plaintiffs must shew that it was a trust for sale out and out, and that the land has actually been sold. There was no trust for sale, only a power. There was an inchoate exercise of that power, but before its complete exercise there was a dealing with the property, by which it became vested in *R. Curzon*, and the contract then proceeded on the footing of his being absolute owner. The power in the will was to raise, by sale or mortgage, £20,000; so legacy duty was payable on that sum and nothing else. The contract had been practically abandoned and a new one entered into. For legacy duty to be paid, there must be an actual sum received by the sale. In *Hobson* v. *Neale* (1), where there was a

(1) 17 Beav. 178.

power to sell and invest enough out of the proceeds to answer two annuities, and a sale was ordered by the Court to raise £20,000 to meet the annuities, it was held that no legacy duty was payable. The certificates furnished by the Inland Revenue Office are both ambiguous. It is the duty of the vendors to procure a certificate that the land is discharged from succession duty in a simple form, according to the 51st section of the Act. This they have failed to do.

Mr. *Osborne Morgan*, in reply:—

The Plaintiffs cannot compel the Crown to accept succession duty. *Hobson* v. *Neale* (1) does not apply, for that was a case of discretionary trust not carried into effect. Here there was a contract for an actual sale, though, through the Defendant's laches, it has not been completed.

March 13. LORD ROMILLY, M.R.:—

This is nominally a suit for the specific performance of a contract, but the real question is, whether the Plaintiffs have produced to the Defendant the proper evidence that no claim has been or can be made from the Inland Revenue Office for succession duty in respect of the hereditaments contracted to be bought by the Defendant. [His Lordship then stated the terms of the devise, the sale of the *Hagley* Estate, and the contract by the Defendant to purchase Lots 2 and 13, and continued:—]

If the matter had rested there, no question could have arisen but that legacy duty and not succession duty was properly payable in respect of the purchase-money to be produced by this sale. But on the 13th of July, 1864, the mortgagees of the property, who were paid off, with the concurrence and by the direction of the Plaintiffs, the trustees, conveyed the hereditaments in question to the Plaintiff, *R. Curzon*, in fee; and by this and the other matters mentioned in the bill and answer, the Plaintiff, *R. Curzon*, became the owner in fee-simple of the whole of the estate. Thereupon the Defendant's counsel stated that, as Mr. *Curzon* was then to be

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considered as the vendor, it must be shewn that succession duty had been paid. The legacy duty, which exceeds in amount the succession duty, has been paid; but the Defendant contends that succession duty is properly payable, and that he is entitled to the usual certificate under the statute that all succession duty has been discharged.

After much correspondence, the parties agreed on a case to be submitted to the Inland Revenue Office, which states the case very fairly. Mr. *Trevor's* letter of the 29th of May appears to me to satisfy the requirements of the case; and Mr. *Trevor*, by writing that letter, stated that the property was free from duty, and the Inland Revenue Office could not claim anything more after such a letter from their comptroller.

The solicitors of the Defendant wrote a letter to Mr. *Trevor* on the 20th of June, 1865, in which they asked him to furnish them with a certificate in the form which they suggested. Mr. *Trevor's* letter of the 21st of June, 1865, does not say whether the payment was for legacy or succession duty, but it says that the duty was paid. The Defendant's advisers were still dissatisfied with this answer and refused to complete the sale, and threatened to bring an action for the deposit money, on which this bill was filed.

A suit founded on a more unfortunate contention can scarcely be conceived. I have considered the matter as carefully as I can, and I am of opinion that the Defendant has been ill advised, and must submit to a decree. In the first place, all the purchaser can require is distinct evidence that no claim will be made by the Inland Revenue Office for any duty on the hereditaments sold by reason of the death of the testator. I am of opinion that if the Inland Revenue Office distinctly states this, the vendor is not compellable to institute proceedings against the Inland Revenue Office to compel them to give a certificate in any particular form.

I am also further of opinion that Mr. *Trevor's* answer of the 29th of May was decisive that the proper duty had been paid. I am also further of opinion that his second answer to the solicitors was decisive, that no more duty could be claimed upon this property; and I am of opinion that, after these two letters, assuming the rest of the title to be unobjectionable, no purchaser could have

resisted the performance of a contract to buy the land in future, on the ground that any claim could be made by the Inland Revenue Office for duty. I think that the Defendant is not entitled to compel the Inland Revenue Office to give a certificate in any particular form.

I am, therefore, of opinion that it is immaterial whether the legacy duty or succession duty was payable originally. I have, however, thought it necessary, in consequence of the argument, to go into that question; and I am of opinion that legacy duty was payable, and not succession duty. On this point the sole question is, whether the sale was made under the power given to the trustees, or whether the sale was made by Mr. *R. Curzon*, the son, as owner in fee-simple; and I think that the sale was made under the power given to the trustees, the original Plaintiffs, by the will of the testator. That the original sale by auction was so is obvious. The contract was with them, and solely with them. There was no contract with Mr. *R. Curzon*. It is true that by reason of subsequent conveyances the whole of the property in fee-simple was vested in *R. Curzon*, and he alone became the necessary party to convey. But this circumstance did not alter the original contract, or make him the vendor. The test, in my opinion, is this: that if the Defendant had filed a bill for the specific prformance of this contract, and had made *R. Curzon* a Defendant to such suit, and *R. Curzon* had put in a demurrer to that bill, that demurrer would, in my opinion, have been allowed. The parties to the contract, and the parties to the contract alone, are the proper parties to be sued for that purpose. They are the trustees on one side and the Defendant on the other; and in my opinion *Robert Curzon* was properly omitted, in the first instance, as a co-Plaintiff in this suit, and need not, notwithstanding the contention of the Defendant, have been made a party to it.

If the original contract had been cancelled by the consent of both parties, and if a fresh contract had been entered into with *R. Curzon*, the matter would have been different. But this is not so. There is no such fresh contract, and there is not the slightest appearance of any such in the evidence or in the pleadings. There is no such allegation. It is simply a case of this description: The original vendors have, by subsequent proceedings and deeds which

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they have sanctioned, vested the whole of the legal estate, and the whole of the equitable interest in the hereditaments, free from all charge, in the son of the testator. But this does not affect the original contract, which was perfectly valid when they entered into it, and which they are bound to perform either personally, or by procuring the conveyance of the property from the persons in whom they have vested it, or allowed it to become vested. The error of the Defendant is, in my opinion, in supposing that the transactions which have taken place since October, 1863, have substituted a new contract for the old one. In my opinion they have not done so. It is the old contract of October, 1863, which constitutes the sale, and which alone can have been in force, although the persons to convey were altered by the subsequent acts of the parties. In equity, assuming the contract to be finally and ultimately executed, all the interests in it and all the rights were complete the moment the contract was signed; and from that moment the Defendant was the owner of the estate in equity under that contract, although if he had taken a conveyance the next day, the trustees would have been the proper parties to convey; and, although after the lapse of two years the son of the testator became the party to convey, it does not, in my opinion, affect the real sale, which was made under the powers contained in the will, and to which the final conveyance of the legal estate is a mere accessory, which completes at law in 1866 that which was complete in equity in 1863.

I am of opinion, therefore, that the Plaintiffs are in the right; that they are entitled to a decree; and that the Defendant must pay the costs of the suit.

Solicitors for the Plaintiffs: Messrs. *Elsdale & Byrne.*

Solicitors for the Defendant: Messrs. *White, Broughton, & White.*

In re HILL POTTERY COMPANY.

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1866
March 15.

Company—Winding-up—Execution issued before Petition presented—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 85.

After a Petition has been presented for the winding-up of a company, the Court has jurisdiction under the 85th section of the *Companies Act*, 1862, to restrain the sale by the sheriff of property of the company, seized under a writ of *fi. fa.* before the presentation of the Petition.

THIS was a motion under the 85th section of the *Companies Act*, 1862, on behalf of the *Hill Pottery Company, Limited*, a company formed and registered under that Act, and five of its directors, who, together with the company, had presented a Petition for the winding-up of the company, for an injunction to restrain the *Merchant Banking Company of London* from taking or continuing any further or other proceedings under a judgment and execution obtained and issued by them against the *Hill Pottery Company*, and to restrain the banking company and the Sheriff of *Staffordshire* from selling any goods of the *Hill Pottery Company*, which had been seized under the execution, until further order.

On the 5th of March, 1866, the banking company obtained a judgment against the *Hill Pottery Company* for £3052, upon which execution issued, and the goods were seized by the Sheriff on the 6th of March, and the sale was advertised to take place on the 14th. The winding-up Petition was presented on the 13th, and on the same day the Petitioners obtained an *ex parte* injunction restraining the sale until the 16th, with leave to give notice of the present motion for the 15th.

It appeared from the affidavits of the manager of the works and others that the stock-in-trade, though worth from £10,000 to £13,000, being for the most part in an unfinished state, was not likely at a forced sale to produce more than £2000 or £3000, and that the works of the company would sell much better as a going concern. After the judgment and execution, one of the directors of the *Hill Pottery Company* had given the *Merchant Banking Company* an equitable mortgage of a leasehold house and a bill of sale

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of furniture, which he estimated to be worth £3000, as a further security for the same debt.

On the 15th of March, before this motion was heard, the Petitioners obtained an order for the appointment of a provisional official liquidator.

Mr. *Baggallay*, Q.C., and Mr. *Hemming*, in support of the motion:—

The property of the company is amply sufficient to pay the judgment debt. The creditor will gain nothing by an immediate sale, and it will be ruinous to the company and the other creditors. It is, therefore, a case in which the Court will exercise the power given to it by the statute to prevent one creditor from exercising his rights so as to destroy the estate.

Mr. *Selwyn*, Q.C. (with him, Mr. *Eddis*), for the Banking Company:—

The creditors having recovered judgment, and the execution having been perfected by seizure before the Petition was presented, the Court will not, even if it can, prevent them from reaping the fruits of their diligence: *In re The Great Ship Company* (1).

Mr. *Birley*, for the Sheriff.

Lord Romilly, M.R.:—Will the execution creditors consent to give up the execution upon the Court declaring them entitled to the first charge on the property for the amount of their debt and costs?

Mr. *Selwyn* said that he was not instructed to consent.

Lord Romilly, M.R.:—

Then the order will be this. The Court having offered to give the execution creditors the first charge on the goods seized for the amount of the debt and costs, and they having refused to accept such offer, order injunction restraining the sale; the Sheriff to go out of possession; the provisional liquidator to pay the Sheriff's costs of this application. Order the provisional liquidator to sell the property the subject of the execution, the proceeds of the sale to be brought into Court and carried to a separate account, and not

(1) 33 L. J. (Ch.) 245.

to be paid out without notice to the execution creditors. The execution creditors to have liberty to accept the offer of the Court before appealing, and in that case, but not otherwise, to have their costs of this application added to their security.

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Mr. *Selwyn* subsequently stated that he was instructed to accept the terms offered by the Court, but asked that the sale might be ordered to be made within a time to be fixed by the order.

LORD ROMILLY, M.R.:—I wish the property to be sold as speedily as possible, provided it is not a forced sale. You can apply for the conduct of the sale, if it does not take place with reasonable speed. I will make the declaration I mentioned, and the rest of the order will be by consent.

Solicitor for the Company and Directors: Mr. *James Bell.*
Solicitors for the Execution Creditors: Messrs. *Flux & Argles.*
Solicitors for the Sheriff: Messrs. *Thomas White & Sons.*

SMITH *v.* DRESSER.

M. R. 1866 *March* 2, 5.

Debtor and creditor—Composition deed—Bankruptcy—Trustee—Invalid trusi—Right of trustee to retain costs.

A debtor made a conveyance of all his property in trust for his creditors, by a deed in the form in schedule D to the *Bankruptcy Act*, 1861. The deed was executed by the debtor and the trustees and duly registered, but was not assented to by the proportion of creditors required by section 192. The trustees got in and converted the estate and deposited the proceeds in their joint names in a bank. Four months after the date of the deed the debtor was adjudicated bankrupt on a judgment-debtor summons for non-payment of a judgment debt due before the date of the deed:—

Held, upon a bill filed by the assignee in bankruptcy, and one of the trustees of the composition deed, against the other trustee, to compel payment to the assignee of the proceeds of the bankrupt's estate, that as the trusts of the deed were invalid, the trustee was not entitled to retain the costs and expenses incurred by him in the execution thereof.

BY a deed dated the 25th of January, 1864, and made in the form of schedule D to the *Bankruptcy Act*, 1861, *Gilbert Hodgson*, a timber merchant, conveyed all his estate and effects to *Henry*

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Dresser and *John Herring*, to be applied and administered for the benefit of his creditors, as if he had been duly adjudged bankrupt. The deed was executed by *Hodgson* and the trustees, and was registered on the 4th of February, 1864, in the Court of Bankruptcy. It was assented to by a majority in number, who were stated in the deed to represent, but did not in fact represent, three-fourths in value of the creditors whose debts amounted to £10.

The trustees collected and sold part of the estate, and deposited £700, the proceeds of the sale, in their joint names, in the *Newcastle-upon-Tyne* branch of the *Bank of England*.

On the 15th of April, 1864, *Thomas Greenhow*, who had recovered a judgment against *Hodgson*, on the 16th of January, 1864, and had not assented to the deed, served *Hodgson* with a judgment-debtor summons; and on the 13th of May *Hodgson* was adjudicated a bankrupt for non-payment of the judgment debt upon the summons, the Commissioner being of opinion that the deed had not been assented to by the requisite proportion of creditors under the 192nd section of the *Bankruptcy Act*, 1861, and therefore did not preclude *Greenhow* from proceeding in bankruptcy. On the 8th of June, 1864, *Charles Septimus Smith* was appointed assignee under the bankruptcy.

In August, 1864, *William Harle*, one of the creditors who had assented to the deed, filed a bill in Chancery on behalf of himself and the other creditors, against *Herring*, *Dresser*, and *Smith*, praying for the execution of the trusts of the deed. Upon the hearing of this suit in March, 1865, the Master of the Rolls expressed his opinion that the trusts of the deed were superseded by the bankruptcy, and ordered the hearing to stand over until the assignee should have made an application to the Court of Bankruptcy to dispose of the estate.

On the 12th of April, 1865, the Commissioner in Bankruptcy being of opinion that the deed of the 25th of January, 1864, was an act of bankruptcy, and void as against the creditors under the bankruptcy, ordered the estate and effects conveyed or purported to be conveyed by the deed to be sold and disposed of for the benefit of the creditors under the bankruptcy.

On the 29th of June, 1865, the bill in *Harle* v. *Herring* was

dismissed with costs, the Master of the Rolls being of opinion that the deed was void as against the assignee in bankruptcy.

Smith thereupon applied to the trustees to pay him the £700 deposited in their names; *Herring* was willing to do this, but *Dresser* insisted on his right to retain the amount of the costs and expenses incurred by him in getting in and converting the estate.

The bill in this suit was then filed by *Smith* and *Herring* against *Dresser*, praying that the Defendant might be decreed to sign all such cheques or orders, and to do all such other things as might be necessary for enabling the Plaintiff *Smith* to obtain payment of the £700 and the interest thereon.

Mr. *Southgate*, Q.C., and Mr. *Bush*, for the Plaintiffs:—

The trusts of the deed being void against the assignee, the Defendant cannot retain out of the estate his costs of executing them: *Elsey* v. *Cox* (1).

Mr. *Cole*, Q.C., and Mr. *Freeling*, for the Defendant:—

The deed was a valid conveyance of the debtor's property: *Symons* v. *George* (2). No doubt it was an act of bankruptcy, upon which the debtor might have been adjudged bankrupt, but the adjudication in fact was upon non-payment after a judgment-debtor summons, and, therefore, only related back to the service of the summons: 24 & 25 Vict. c. 134, s. 84. The effect of the bankruptcy was not to invalidate the deed *ab initio*, but only to supersede its trusts in favour of the creditors under the bankruptcy. That is all that was decided either by the Commissioner, or by this Court in *Harle* v. *Herring*. The deed being valid and appearing to comply with the requisitions of the 192nd section of the *Bankruptcy Act*, 1861, the trustees were justified in acting under it, just as in *Lloyd* v. *Harrison* (3), the sheriff was held justified in releasing a debtor on production of the certificate of registration of a composition deed, though the deed did not in fact satisfy the conditions of the Act. It would be inequitable to

(1) 26 Beav. 95.

(2) 3 H. & C. 68, 996.

(3) 34 L. J. (Q.B.) 97.

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allow the creditors under the bankruptcy to have the benefit of the expense incurred by the trustees without reimbursing them. Trustees have been allowed their costs under deeds void under 27 Eliz. c. 4, and 13 Eliz. c. 5: *Daking* v. *Whimper* (1); *Goldsmith* v. *Russell* (2). If the deed is void, and the Defendant is no longer a trustee, the assignee might have sued him at law for the money, and the Plaintiffs have no *locus standi* in equity.

They also referred to *In re Tresidder* (3); *Stevenson* v. *Newnham* (4); *Wallwyn* v. *Coutts* (5).

Mr. *Southgate*, in reply:—

The deed was void against creditors under 13 Eliz. c. 5, and under the Bankruptcy Acts as an act of bankruptcy: *Ex parte Alsop* (6). A trustee can only retain his costs out of the trust estate, and here there is no trust estate, the trusts being void. In *Daking* v. *Whimper* (1) the trustees' costs were in effect paid by the settlor; in *Goldsmith* v. *Russell* (2) the point was not argued, and it appears probable from the decree in that case that there was a surplus, after payment of the debts, available for the trustees' costs. The money being deposited in the joint names of the Defendant and *Herring*, this suit was necessary, and the Defendant ought to pay the costs.

March 5. LORD ROMILLY, M.R.:—

This is a suit instituted by the assignee of a bankrupt to recover a sum of money belonging to his estate.

The case is this: *Gilbert Hodgson*, who afterwards became bankrupt, having a judgment debt entered up against him, made an assignment of his estate and effects to two trustees, *Herring*, the co-Plaintiff, and *Dresser*, the Defendant, under the 192nd section of the *Bankruptcy Act*, 1861; three-fourths in value of the creditors of *Gilbert Hodgson* did not execute the deed, and consequently it had no validity under the Act, and, being a conveyance of his estate and effects by a debtor in order to defeat the payment of

(1) 26 Beav. 568.
(2) 5 D. M. & G. 547.
(3) Law Rep. 1 Ch. 21.
(4) 13 C. B. 285.
(5) 3 Mer. 707; 3 Sim. 14.
(6) 1 D. F. & J. 289.

a judgment debt, it was void as regards his creditors. On the 13th of May, 1864, *Gilbert Hodgson* was adjudicated bankrupt upon a summons for non-payment of a judgment debt, and in June, 1864, the Plaintiff *Smith* was appointed his assignee. Under the trusts of the deed of the 25th of January, 1864, *Dresser* and *Herring* received £700, which they paid in their joint names into the *Newcastle* branch of the *Bank of England;* application was made by the Plaintiff to have this sum paid to him, which was refused by the Defendant *Dresser*, unless he were allowed payment of costs and expenses incurred by him as trustee under the deed, and thereupon in October, 1865, this bill was filed.

In my opinion the Defendant has mistaken his position in this matter. He was appointed trustee under a deed, the trusts of which were all invalid. He was, or ought to have been, aware of this fact before he began to act in the trusts, and he should have taken no step in the matter until he had satisfied himself that three-fourths in value of the creditors had assented to the deed. A very little inquiry would have made it clear that this had not been done, although on the face of the deed the contrary is alleged; but, even if this were not so, I could not give the Defendant the costs of a trustee, when, in fact, he is no trustee at all. What a trustee is entitled to have are the costs of executing trusts, existing and valid, which he has undertaken to perform; but, if the trusts are invalid, he has no trusts to execute, and it is not competent to him to execute any. It is said that this deed is effective for certain purposes—that is, it is effective for the purpose of conveying the property thereby purported to be conveyed. Assuming this to be the fact, the trustee has by such conveyance incurred no costs; and, if there is any property vested in him, he is entitled to have his costs of a reconveyance, if a reconveyance from him is necessary. But, as all the trusts are void, he cannot have incurred charges and expenses which could be allowed by this Court, in the performance of that which is, in truth, a mere invalid and inoperative nominal trust. In one sense, no doubt the Defendant is a trustee, as every man is constructively a trustee who is in possession of property belonging to another, of which property he did not culpably obtain possession: in a sense every debtor is a trustee for the creditors, in respect of the money which he owes to

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the creditors; but, unless adverse claims are made to the money in his hands, he cannot properly be called a trustee, even constructively; and, when such claims are not made, he is simply a debtor; and such is the position of the Defendant. The trusts being void, he had no duty to perform, and he ought to have paid the money over at once to the assignee, no claim being made, or being possible to be made, against the money in his hands. He is the less justified in the course he has adopted in causing this suit to be instituted, because in the cause of *Harle* v. *Herring*, which was instituted for the purpose of carrying into effect the trusts of this deed, and to which suit he was a Defendant, he did ascertain by the decision of the Court that the trusts of the deed of January, 1864, were wholly void, and that he could not therefore claim any of the rights incidental to a trust, which, in truth, never existed.

In my opinion he has occasioned the suit, and he must pay the costs of it.

Solicitors for the Plaintiffs: Messrs. *Hill & Hoyle.*
Solicitors for the Defendant: Messrs. *Linklaters & Hackwood.*

M. R. 1866 Feb. 28.

EARL COWLEY *v.* WELLESLEY.

SC 35 Beav 635.

Trustees, management by—Tenant for life and remainderman—Timber—Thinnings—Fines on grants—Sale of gravel—Fencing—Enfranchisement—Costs of rendering accounts for Succession Duty.

On a case submitted to the Court by trustees as to certain questions arising between the equitable tenant for life and the remainderman in the management of the estate:—

Held, that the produce of the sale of underwood and of timber cut periodically, in the regular course of thinning, was to be treated as income, and that of timber not cut in the regular course, but to improve the growth of the remaining trees, as capital.

Held, also, that the produce of the sale of gravel on the waste lands, and likewise the fines payable on grants of waste lands made by the trustees, and moneys payable in consideration of the waiver by the trustees of restrictive conditions in grants made by them (but not where the grants were made by the testator), and likewise preliminary fines paid to the trustees as lords of the manor on the enfranchisement of copyholds by persons admitted before the 1st of July, 1853, pursuant to the *Copyhold Act*, 1852, were respectively to be treated as income.

182 J 307
SCh D. 382
Saff Cas
466

Held, also, that the expense of fencing waste lands granted to a trustee for the benefit of the estate must be paid out of capital; and that the costs of rendering accounts for the succession duty, payable for the first equitable tenant for life, must be paid out of income.

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THIS was a special case for the opinion of the Court on certain questions between the tenant for life and those entitled in remainder under the will of the late Earl of *Mornington*.

The testator devised all his real estates to trustees, upon trust for the Plaintiff Earl *Cowley* for life, and after his decease for the Plaintiff Viscount *Dargan* for life; with divers remainders over, and an ultimate trust, for his own right heirs, with directions that his trustees should manage the same premises, and might cut timber and underwood from time to time in the usual course, for sale or repairs or otherwise.

The Plaintiffs were the successive equitable tenants for life of the estate; the Defendants were the persons entitled to the first estate in remainder, and the trustees.

Part of the real estate of the testator in *Hampshire* consisted of about 338 acres of woodland, on which there were trees and underwood, both of a thriving description, the trees being principally oak, and the course of management had for many years been to cut the underwood of from ten to twelve years' growth every year, and the underwood upon about twenty acres of the woodland had been cut every year. In the ensuing spring it was usual, where the underwood had been cleared, to cut down such trees as were likely to obstruct or prejudice the growth of those intended to be preserved, and which, having regard to the general improvement of the woods, should be cut down.

The trustees had followed this rule, and had applied the proceeds of the sale of the underwood as income, and the timber, being such thinnings as aforesaid, had been partly used in repairs on the estate, and the larger part had been sold.

Part of the real estate in *Wiltshire* also consisted of woodlands, containing oak, ash, elm, Scotch fir, larch, and spruce trees, and underwood. During the testator's life the underwood was occasionally cut, but the trees in such woods and plantations were not thinned. It was considered desirable, in order to improve the growth of the woods, to fell a number of the trees, including trees

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of all the above-mentioned descriptions. The trees which had been felled were felled for the purpose of *improving the growth of those remaining*. Part of the trees so felled had been used for repairs upon the estate, and the remainder had been sold standing.

The first question for the opinion of the Court was whether the money produced by the sale of timber in the counties of *Hants* and *Wilts*, cut as before stated, should be treated as capital or income.

Mr. *Hobhouse*, Q.C., and Mr. *J. Pearson*, for the Plaintiffs:—

These cuttings belong to the tenant for life, and should be applied as income. In *Burges* v. *Lamb* (1), Lord *Eldon*, after stating that there was a large quantity of underwood on the estate which was to be considered not only with regard to its own value, but also to the timber growing among it, said, "With reference to that, Lord *Hardwicke's* opinion in *Knight* v. *Duplessis* (2), is material that it is not waste to cut timber where necessary for the growth of the underwood in which it is situated." If this be so *à fortiori* it is not waste to cut underwood where it is necessary for the growth of other timber. In *Pidgeley* v. *Rawling* (3), Sir *J. L. Knight Bruce* expressed his opinion that the thinnings of fir trees belonged to the tenant for life. In *Rex* v. *Ferrybridge* (4) it was held that Scotch fir trees were not rateable to the poor as saleable underwood. In *Bateman* v. *Hotchkin* (No. 2) (5), a tenant for life impeachable for waste was held to be entitled to such part of a wind-fall as he would have been entitled to cut himself, and to all fair and proper thinnings. In *Bagot* v. *Bagot* (6), the rights of a tenant for life and remainderman to such cuttings were also considered. In *Tooker* v. *Annesley* (7), a tenant for life, subject to impeachment for waste, was held to be entitled to the interest of money produced by the sale of timber that was deteriorating, cut by order of the Court.

Mr. *Joshua Williams*, Q.C., and Mr. *Nalder*, for the Defendants:—

(1) 16 Ves. 174, 179.
(2) 2 Ves. Sen. 360.
(3) 2 Coll. 275.
(4) 1 B. & C. 375.
(5) 31 Beav. 486.
(6) 32 Beav. 509, 517.
(7) 5 Sim. 235.

The cuttings of the timber in both estates must be treated as capital, and belong to the inheritance. In *Bateman* v. *Hotchkin* (1) a distinction was drawn between waste committed by a tenant for life in cutting timber, the produce of the sale of which belonged to the inheritance, and the sale of timber blown down by a storm, such as he would have been entitled to cut himself, the produce of which belonged to the tenant for life. In this case the will contains no direction that the produce of the timber shall belong to the tenant for life, and at any rate the cuttings made for the improvement of other timber belong to the inheritance.

Mr. *G. Williamson,* for the Trustees.

LORD ROMILLY, M.R. :—

I am of opinion that the money produced by the sale of timber in the estate in the county of *Hants,* where it has been cut in the regular course of thinning, should be treated as income; and that the money produced by the sale of timber in the estates in the county of *Wilts* should be treated as capital, except where it has been cut in the regular course of thinning.

A further question submitted to the Court, was, whether the money produced by the sale made by the trustees of gravel dug and taken from the waste lands of the manors, the profits of which had been usually gained for many years by working the gravel pits, should be treated as capital or income.

LORD ROMILLY, M.R. :—

I think that the money so produced by the sale of gravel belongs to the tenant for life. The whole of the gravel or sand on the waste land must be treated as a mine, and each gravel pit as if it were a fresh pit in the mine.

A further question submitted to the Court arose as follows:— The testator was, at the time of his decease, seised of certain manors, and the trustees had since his death, as lords of the

(1) 31 Beav. 486.

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manors, made grants of portions of the waste lands belonging to them, and received fines in respect of the admissions on such grants, which they had treated as income. In some cases grants had been made subject to certain restrictive conditions as to building; and the trustees, as lords of the manors, might be applied to for releases or a waiver of those conditions, in consideration of a sum of money to be paid by the persons requiring the same.

It was submitted for the opinion of the Court whether such fines and the consideration moneys for releasing conditions should be considered capital or income.

Mr. *Hobhouse*, for the Plaintiffs, contended that both the fines and the consideration for the release of the conditions were income, and the ordinary profits of the manor.

Mr. *Joshua Williams*, for the Defendants, contended that, at any rate, as regarded the release of the conditions by the trustees, the consideration belonged to the inheritance.

LORD ROMILLY, M.R.:—In the case of grants made by the trustees since the death of the testator, the trustees who imposed the conditions may also release them, and the tenant for life is entitled to the benefit of the consideration. With respect to the fines on grants made by the testator, they belong to the inheritance, and must be treated as capital.

A further question related to enfranchisements effected in the manors since the testator's death, where preliminary fines had been paid to the trustees as lords of the manors by the persons enfranchising the same, by reason of their admission having taken place before July 1st, 1853, as is mentioned and provided for in the *Copyhold Act* of 1852, s. 1. It was submitted to the Court whether such fines were to be treated as capital or income.

LORD ROMILLY, M.R.:—These preliminary fines must be treated as income.

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A further question was whether the expense of fencing waste lands granted since the testator's death by the trustees to a trustee for them, for the benefit of the estate, was to be paid out of capital or income. The will empowered the trustees to drain and otherwise to improve the land.

Mr. *Joshua Williams* referred to *Dent* v. *Dent* (1).

LORD ROMILLY, M.R.:—The expense of such fencing must come out of capital.

A further question was as follows:—By the testator's will, the Plaintiff, Earl *Cowley*, was equitable tenant for life of the devised estates, and it became necessary to render to the Inland Revenue office an account of the estates for the purpose of paying the succession duty in respect of his life interest, and the trustees had prepared and rendered such account. It was submitted to the Court whether the costs of preparing and rendering the same should be paid out of capital or income.

Mr. *Hobhouse*, for the Plaintiffs:—

The cost of rendering the first account for succession duty is by far the most expensive, and the same returns are available for the remainderman, so the cost of rendering them may fairly be defrayed out of capital.

Mr. *Joshua Williams*, for the Defendants:—

If the tenant for life were in possession he must have borne the expense of these returns. All costs relating to succession duty are properly incident to the tenant for life.

LORD ROMILLY, M.R.:—

The cost of these returns must be paid by the tenant for life.

Solicitors: Messrs. *Coverdale, Lee, & Co.*

(1) 30 Beav. 363.

V.-C. S.
1866
Feb. 23;
March 8.

HUME *v.* POCOCK.

12 Jur N S 223

Vendor and Purchaser—Defective Title—Specific Performance.

16 Ch D 419

Defendant purchaser in possession, who, by decree directing an inquiry as to title, was ordered to pay into Court the interest on his purchase-money; the decree also declaring the purchase-money a lien on the estate:—

Held, not entitled to dismiss the bill for specific performance, although the certificate was that the Plaintiff could not shew a good title, it appearing on the evidence that the Defendant had since the purchase, by his own act, acquired the means of curing the defect in the title. Leave was given to amend or file a supplemental bill.

BY an Act of Parliament passed in 1859, incorporating the *Lands Clauses Consolidation Act*, 1845, the Defendant and others became the undertakers for executing the purposes of the Act which were to enable them to embank from the sea, reclaim, cultivate, and otherwise improve all or any part of certain waste lands subject to be covered by tidal waters situate in the estuary known as *Chichester Harbour*. Among the lands which the Defendant and a co-undertaker (*Thomas Kingdon*) were desirous of obtaining for the purposes of the reclamation, were part of the manor of *Chidham*, the Island of *Pilsea*, situate in *Chichester Harbour*, and certain copyholds of inheritance known as *Saltings*, situate in *Hayling* Island.

By a memorandum of agreement dated the 3rd of June, 1859, after reciting *inter alia* that the Plaintiff was, under a memorandum dated the 10th of January, 1855, a mortgagee in fee with power of sale of the property above mentioned, he, as such mortgagee, agreed that in the event (which happened) of the Act being obtained he would complete his title as mortgagee in fee, with power of sale and sell to *Kingdon* and *Pocock* the property above mentioned, and all and every of their rights, members and appurtenances for the sum of £2400; and *Kingdon* and *Pocock*, as undertakers named in the Act, agreed that they would purchase the same of the Plaintiff at that sum, and that the purchase should be completed within two years next after the passing of the Act, with interest at £5 per cent. from the 9th of April, 1859. And "that *Robert Hume* (the Plaintiff) shall deduce and shew a good title, as mortgagee,

in fee, with power of sale, to the said hereditaments and premises, and that the sum of £2400 and interest shall be a charge upon the said manor, islands, saltworks, and land to be inclosed."

Thomas Kingdon and another assigned their interest under the agreement to the Defendant *Thomas Pocock*, and he became the sole undertaker, and alone interested under the Act, and the contract of June, 1859, respectively. Prior to October, 1864, the Defendant took possession of the property, or some part of it; but the Plaintiff, as he alleged, did not ascertain that fact till October, 1864, when he discovered that the Defendant had prosecuted certain works in depositing a bed of mud; in erecting houses; in constructing embankments; and in excavating, and carrying away portions of the soil.

The Plaintiff required the Defendant to desist from the said operations, or to deposit the purchase-money and interest in their joint names in the *London & Westminster Bank* until the purchase should be completed, but the Defendant having admitted the existence of the contract, and having refused to accede to the request as to the deposit, the Plaintiff filed his bill in October, 1864, praying for specific performance of the contract; for payment by a short day of £2400 with interest from the 9th of April, 1859, into Court; and in default for an injunction; and if specific performance could not be decreed, for damages in substitution thereof.

The Plaintiff also prayed for a decree that the puchase-money and interest constituted a charge on the land to be reclaimed under the Act.

Under an order made by the Lords Justices on the 17th of December, 1864, the Defendant paid into Court £668 14*s.* 7*d.* being interest on the purchase-money to the 17th of January, 1865. The answer of the Defendant filed the 29th of December, 1864, stated (paragraph 14) that "it is not the fact that the Plaintiff" as he in his bill alleged "has done all things on his part to be done to entitle him to a specific performance of the agreement. He has not, so far as I know, completed his title as mortgagee in fee with power of sale as stipulated for in the agreement, nor has he deduced and shewn a good title, or any title as mortgagee in fee with power of sale to the hereditaments and

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premises comprised in the agreement" and (paragraph 18) that "I have sustained considerable injury by reason of the default which the Plaintiff has made in not performing his part of the contract. I have been compelled to purchase and obtain a conveyance of *Pilsea* Island from the mortgagee thereof, and I have lost the rents and profits of the lands called *Saltings*, and also of the manor of *Chidham;* and I submit that the Plaintiff ought to make compensation to me in respect of the matters aforesaid, and in respect of any other loss or injury I may have sustained or may sustain in consequence of the neglect of the Plaintiff to make out a good title according to the terms of the agreement."

The order of the Lords Justices of the 17th of December, 1864, also directed that the purchase-money should be paid into Court on or before the 17th of April, 1865. On the 2nd of May, 1865, two motions came on to be heard before the Lords Justices on behalf of the Defendant to extend the time for payment, and to dismiss the bill for want of prosecution. On the suggestion of their Lordships (the only question being one of title) the parties consented to an immediate decree being taken, and it was declared "that the agreement ought to be specifically performed and carried into effect, provided that a good title could be made to the hereditaments comprised therein," and "that the purchase-money and interest payable under the agreement was a charge upon the hereditaments comprised therein."

An inquiry was ordered "whether a good title could be made," and other inquiries in case that should be certified in the affirmative. Under the order of the 2nd of May, the Defendant paid a further sum of £668 14*s.* 7*d.* into Court. When the decree was carried into Chambers the Plaintiff for the first time (by direction of the chief clerk) delivered an abstract of his title, and upon that the chief clerk, on the 5th of August, 1865, certified that "a good title could not be made to the hereditaments, inasmuch as by such agreement the Plaintiff contracted to sell as mortgagee in fee, whereas as to part of such hereditaments he is mortgagee for a term of years only without power of sale."

The Plaintiff did not except to the certificate.

The cause now came on upon further consideration.

By an indenture dated the 10th of November, 1864, the De-

fendant, in consideration of the sum of £10, had obtained from the eldest son and heir-at-law of the mortgagor a conveyance of the fee of three parcels of land in *Pilsea Island*, containing 4a. 3r. 28p. each, subject to a mortgage to the Plaintiff for a term of 1000 years to secure the sum of £175.

Mr. *Malins*, Q.C., and Mr. *Fry*, for the Plaintiff:—

The case of *Murrell* v. *Goodyear* (1) shews that the Defendant cannot avail himself, as he has attempted to do, of any information which he may have obtained after he entered into the contract, and after the Plaintiff had filed a bill for specific performance. The Defendant had full knowledge of the Plaintiff's title and of the defect in it. The Plaintiff had a right to get rid of that defect, but the Defendant went to the mortgagor and defeated the Plaintiff's power to obtain a good title by purchasing the equity of redemption from him. The Defendant ought to be decreed to perform the contract.

Mr. *Bacon*, Q.C., and Mr. *Macnaghten*, for the Defendant:—

The bill ought to be dismissed. It is evident that it ought not to have been filed. All the rights of the mortgagor are vested in the Defendant, and he is entitled to redeem and the Plaintiff to foreclose. The Plaintiff ought to make compensation to the Defendant for the injury which he has sustained by reason of the Plaintiff's default. No abstract was delivered till after the 2nd of May, 1865, therefore the case is not like *Murrell* v. *Goodyear*. No information as to the title was obtained from the Plaintiff. To protect himself the Defendant purchased the equity of redemption, and the Plaintiff was at once informed of that fact. The proper course would be to leave the Plaintiff to his remedy under the *Lands Clauses Consolidation Act*.

March 8. SIR JOHN STUART, V.C.:—

This case has now come before the Court under extraordinary circumstances. The decree of the Lords Justices has directed the

(1) 2 Giff. 51; 1 D. F. & J. 432—447.

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specific performance of the agreement, provided that a good title can be made. The certificate shews now that a good title cannot be made, and the Defendant asks, as of course, that the bill be dismissed out of Court, there being no motion by the Plaintiff to vary the certificate. But other parts of the decree seem rather to indicate that the Court foresaw the ultimate possibility of a modified performance of the agreement to purchase. When the decree was pronounced, the Court saw the fact of the possession of the property by the Defendant, or those claiming under him. It also saw that the purchaser during the possession which he acquired under the agreement had dealt with the property in a way to make his restitution of it in its integral state impossible. These facts may account for the special form of the decree which seems to shew that the Court had in view the ultimate possibility that even if a good title could not be shewn by the Plaintiff, he might still be entitled to some relief as a vendor. This is still more apparent from the fact that the decree was made after the Defendant had put in his answer, which states that he had subsequently to the contract purchased the equity of redemption; and it may reasonably be conjectured that the variation which the decree makes in the order of the 17th of December, 1864, as to payment of the purchase-money (an order made before the answer was filed) was occasioned by the statements in the answer.

Although the certificate is conclusive against the title, the Plaintiff now relies on the principle of the case of *Murrell* v. *Goodyear*. If the frame of the bill justified it, there is certainly enough in the decree to entitle him to proceed now to shew his right to relief on that footing. But the bill prays no alternative relief, and contains no averments on which any other relief can be given than on the footing of his being a mortgagee in fee with a power of sale. *Murrell* v. *Goodyear* is only one of a class of cases in which a modified performance of the agreement has been decreed. It is quite possible that if the Plaintiff had amended his bill with reference to the statements in the 14th and 18th paragraphs of the answer, he might have averred and proved a case for relief on the principle that since the contract the Defendant has ascertained and has himself cured the defect in the title by purchasing the equity of redemption, and is now by means of the contract in pos-

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session and enjoyment of the whole of the Plaintiff's beneficial interest in the property under such circumstances, that although the Plaintiff cannot perform the contract specifically by shewing a title as mortgagee in fee with a power of sale, still he is entitled to a modified performance, and entitled to recover, as the price of what the Defendant had obtained under the contract, some other sum less than the contract price.

But a case of that kind must be distinctly averred and proved so as to give the Defendant an opportunity to make out a case against that mode of relief. Considering the terms of the decree, and the declaration of lien in favour of the Plaintiff, it seems to me that the Court cannot dismiss the bill and thereby allow the Defendant to continue in possession of the Plaintiff's interest in the property without paying any price or making any compensation. Therefore the cause must stand over, with liberty to the Plaintiff to amend the bill or to file such supplemental bill as he may be advised with reference to the matters stated in the 14th and 18th paragraphs of the answer, or otherwise; with liberty to apply.

Solicitors for the Plaintiff: Messrs. *Baxter, Rose, Norton, & Co.*
Solicitors for the Defendant: Messrs. *Chilton, Burton, & Co.*

In re VIZARD'S TRUSTS

V.-C. S. 1866 *March* 9.

Will—Appointment—Bankruptcy Act, 1861—*Deed—Schedule D.*

A legatee, entitled under a will to such share as testator's widow should appoint, and in default to one-fifth of a moiety, by a deed under the *Bankruptcy Act*, 1861, assigned all his "estate and effect" to trustees for creditors. The widow having subsequently appointed to the legatee the same share he would have taken in default of appointment:—

Held, that the appointed share did not pass under the deed.

GEORGE VIZARD by his will dated the 31st of January, 1854, devised to his wife and his nephews, *John Vizard* and *William Vizard*, their heirs, executors, administrators, and assigns, all his freehold and leasehold estates, and all such parts of his personal estate as should consist of money or securities, or held in trust for

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him, upon trust for his wife during her life, and after her decease he gave the same to all and every, or such one or more of the children of his late brothers, *John Vizard* and *Charles Vizard*, and the issue of such children as should be dead, in such shares and proportions for such estates, and in such manner and form as his wife should by any deed, or by her last will and testament in writing, or any codicil thereto from time to time direct and appoint, and in default of and subject to any such direction or appointment, he gave, devised, and bequeathed one moiety of the same freehold, leasehold, and personal estates, &c., to such of the children of his deceased brother *John* as should be living at his decease, their heirs, executors, administrators, and assigns, as tenants in common, and the other moiety thereof to such of the children of his deceased brother *Charles* as should be living at his decease, their heirs, executors, administrators and assigns, as tenants in common.

The testator died in April, 1854, and his will was proved by his widow, and one of the executors, *John Vizard*.

Five children of *Charles* and three of *John* survived the testator.

In November, 1861, *Frederick Vizard*, one of the five children of *Charles*, being in insolvent circumstances, executed a deed of assignment in favour of creditors under the 192nd section of the *Bankruptcy Act*, 1861, in the form of schedule D.

The deed was as follows:—

"This deed, made the first day of November, 1861, between *Frederick Vizard* of *Dursley*, in the county of *Gloucester*, common brewer, and *E. P. Shute*, of the same place, gentleman, on behalf and with the assent of the undersigned creditors of the said *Frederick Vizard*, witnesseth that *Frederick Vizard* hereby conveys all his estate and effects to *E. P. Shute*, absolutely to be applied and administered for the benefit of the creditors of *Frederick Vizard* in like manner as if *Frederick Vizard* had been at the date hereof duly adjudged bankrupt."

The testator's widow, *Charlotte Louisa Vizard*, by her will dated the 26th of February, 1864, reciting the will of the testator, and the power of appointment, did, in exercise and execution of the

power and authority given to her for that purpose under her husband's will, and of every other power enabling her in that behalf, direct and appoint one moiety of the aforesaid freehold and leasehold and personal estate and property from and after her decease, unto and equally between the five surviving children of *Charles Vizard* as tenants in common, and the other moiety equally between and among the three sons of her husband's brother *John*.

The testator's widow died on the 29th of July, 1865, and her will was duly proved by the executors, *John* and *William Vizard*.

On the 2nd of February, 1866, the executors paid into Court to the credit of the above matter the sum of £562 0*s*. 6*d*., being one-fifth share of the moiety of the said trust funds appointed by the testator's widow among the children of *Charles*.

The trustees deposed that *Frederick Vizard* the Petitioner had obtained a certificate of registration of the deed under the 198th section of the Act, but had not obtained an order of discharge as if he had been a bankrupt under the 197th section of the Act.

The affidavit stated the claim of the assignee under the deed of the 1st of November, 1861, and the counter claim of the Petitioner to the fund paid into Court.

Mr. *Bacon*, Q.C., and Mr. *Chapman Barber*, for the Petitioner:—

The Petitioner after executing the deed in the form of schedule D of the *Bankruptcy Act*, 1861, was entitled to his discharge under the 198th section of the Act, and was protected in his person and property against all proceedings in respect of antecedent debts.

It is clear that everything to which he was then entitled passed under the deed, and it is clear also that his chance of taking anything under the appointment of the widow was not a possibility coupled with an interest, or anything but a mere chance not capable of being assigned.

Upon principle, therefore, the Petitioner's interest under the appointment did not pass under the deed.

But the precise question is covered by the authority of

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Lee v. *Olding* (1), which is not distinguishable from this case, and has been cited with approval by Lord *St. Leonards* (2).

[*Ex parte Gibbons* (3) was also cited.]

Mr. *Malins*, Q.C., and Mr. *John Pearson*, for the assignee under the deed:—

If the case of *Lee* v. *Olding* (1) is to be treated as conclusive, it will probably govern this case.

The VICE-CHANCELLOR:—I am quite ready to overrule *Lee* v. *Olding*, if you satisfy me my decision in that case was wrong.

Mr. *Malins*:—It is not denied that every interest which the Petitioner took under the testator's will in default of appointment passed under the deed. If therefore the donee of the power had made no appointment, the creditors would be entitled. But what had she done? Simply appointed what would have passed in default of appointment, and the instrument is in fact a nullity. There are two questions: Was the interest in default of appointment defeasible? Clearly it was. Then, has it been defeated? Clearly not, because the legatee took exactly what was given by the will.

This is not a general but a special power of appointment, authorizing no appointment to strangers, but simply authorizing the donee to vary the proportion given by the will. The will and the appointment must be read together, because all that the appointment did was to point out the manner and proportion in which the gift under the will should take effect.

Mr. *Roxburgh* for the trustees of the will.

SIR JOHN STUART, V.C.:—

There appears to be a difficulty in the circumstance that under the appointment the appointee takes neither more nor less than he would have taken in default of appointment.

Still the appointment is an instrument, executed by a person who had authority under the power to give to the appointee, as an object of the power, such interest as it was her pleasure to give. If so, what authority has this Court to say that the exercise

(1) 2 Jur. (N. S.) 850. (2) Sug. on Powers, p. 78, 8th ed.
(3) 13 W. R. 1001.

of the power by the donee, by an instrument in conformity with all the solemnities required by the testator, and giving to the object what was clearly authorized by the power, is to be treated as a nullity because it so happens that neither more nor less has been given under the power than would have passed to the appointee under the will in default of appointment? It is not even suggested that the appointment can be got rid of. There must be a declaration that the appointee is entitled to the fund, and an order for payment accordingly.

Solicitors for the Petitioner and the Trustees of the will: Messrs. *Vizard & Anstie.*

Solicitors for the Trustee of the deed: Messrs. *Meredith & Lucas.*

MILLS *v.* TRUMPER.

Statute 11 *Geo.* 2, *c.* 19, *s.* 15—*Apportionment—Tenant pur autre vie.*

Where a tenant for life, under a settlement of an estate *pur autre vie*, renewed the lease for lives to himself and his heirs, purchased the fee, made a parol demise for a year, but died before the end of the current half year, and a remainderman entered and received the rent, on a bill by the executor of the tenant for life against the remainderman :—

Held, that the rent must be apportioned under the 11 Geo. 2, c. 19, s. 15.

Revd by L.J. 4 K. 320

BY indentures of lease and release dated 26th and 27th of January, 1811, between *W. Walwyn Trumper* and *Elizabeth* his wife, of the one part, and *Thomas Hughes* and *John Trumper*, of the other part, certain lands in the county of *Monmouth* were released and conveyed to the said *T. Hughes* and *J. Trumper*, their heirs and assigns, for the lives of the *cestuis que vie* in a lease dated the 29th of September, 1795, and the survivor of them, subject to the payment of £98 6*s.* rent, and to a life estate in part of the said premises in one *T. Trumper*, who died in 1814, upon trust to permit *W. Walwyn Trumper* to receive the rents and profits during his life, and after his death, with remainder to the Defendant, *Thomas Trumper*, his heirs and assigns, when he should attain twenty-four.

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Prior to the 11th of May, 1818, the lives having fallen in, by an indenture of lease by way of feoffment dated the 11th of May, 1818, for the consideration therein mentioned the Duke of *Beaufort* demised the same lands to *W. Walwyn Trumper*, his heirs and assigns, to hold the same for the lives of the Defendant *Thomas Trumper*, *W. Trumper* the younger, and *E. Trumper*, subject to rent and covenants.

In 1819 *W. Walwyn Trumper* purchased from the Duke of *Beaufort* the reversion in fee in the said lands, which was conveyed by an indenture of the 21st of January of that year, subject to the estate *pur autre vie* subsisting in *W. Walwyn Trumper*, to one *James Davies*, in fee in trust for *W. Walwyn Trumper*, his heirs and assigns, to be conveyed as he should direct.

The estate consisted of three farms: the *Lower Grounds*, let by a parol demise to *John Jones*, as a yearly tenant; the *Greige*, let also on a parol demise to one *Watkins*, also as a yearly tenant: and the *Lawns*, which, until 1845, had been kept in hand by *W. Walwyn Trumper*, but after that year was let by him on a parol demise at £200 a-year rent to the Defendant, *Thomas Trumper*, who was entitled under the settlement of 1811 to the estate *pur autres vies* in remainder, expectant on the decease of his father, *W. Walwyn Trumper*. The rent on all three farms was payable half-yearly, on the 2nd of February and 2nd of August in each year.

W. Walwyn Trumper, the tenant for life, died on the 23rd of December, 1839, having by his will appointed the Plaintiff, *N. J. Mills*, and the Defendant, *Thomas Trumper*, his executors. Under his will, subject to certain charges and incumbrances, the Defendant took the estate in fee.

On the death of *W. Walwyn Trumper*, the Defendant, *Thomas Trumper*, entered into possession of the estate, and received from the tenants, *Jones* and *Watkins*, the half-year's rent, payable on the 2nd of February after his father's death; but he refused to account to his co-executor for such part of the rent, as, if it were apportionable, would, up to the death of the tenant for life, belong to his estate; and refused also to pay any apportioned part of the rent of the *Lawns*, which he himself had held on a yearly tenancy by parol from the tenant for life. His co-executor thereupon filed this bill to administer the estate.

Mr. *Malins*, Q.C., and Mr. *S. H. Blackmore*, for the Plaintiff:—

This case falls exactly within the 15th section of the 11 Geo. 2, c. 19.

Under the settlement of 1811, *W. Walwyn Trumper*, the tenant for life, was tenant for life of the farms for an estate *pur autres vies*, remainder to the Defendant, *Thomas Trumper*. He subsequently purchased the reversion in fee, which, however, did not vary his position. When he renewed the lease, he did so for his own benefit and for the benefit of those in remainder, and therefore, after the renewal, the trusts of the settlement of 1811 were still subsisting. The parol lease was thereof an interest carved out of his own life estate, and terminated with it. If so, the case falls within the precise definition of the statute, of a lease which determines on the death of a tenant for life on or before the day on which the rent is reserved.

It is submitted, therefore, that the rent on the three farms must be apportioned.

Mr. *Greene*, Q.C., and Mr. *John Pearson*, for the Defendant:—

The rent is clearly not apportionable under the 4 & 5 Wm. 4, c. 22, because that statute only applies to rents payable from year to year, reserved by an instrument in writing: *In re Markby* (1).

Neither is the rent apportionable under the 11 Geo ., s. 15, because it was intimated, if not decided, by Chief Justice *Mansfield*, that that statute did not apply to the case of a death of a tenant *pur autre vie*: *Wykham* v. *Wykham* (2).

But, further, in order to bring this case within the statute (the 11 Geo. 2, c. 19, s. 15), this yearly tenancy must have determined on the death of *W. Walwyn Trumper;* but when he renewed the lease for the fresh lives, which are still subsisting, he took the estate to himself and his heirs as trustee for the parties interested under the settlement of 1811. It was clear, therefore, that no action would lie by *W. Walwyn Trumper's* executors for rent, but if so the claim could not be supported here, as all this Court does is to give what the executor could have recovered at law.

(1) 4 My. & Cr. 484. (2) 3 Taunt. 316-331.

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Ex parte Smyth (1) and *Cattley* v. *Arnold* (2) were referred to.

Mr. *Malins* commenced his reply, but was stopped by the Court.

SIR JOHN STUART, V.C.:—

I think the case falls within the 15th section of the 11 Geo. 2, c. 19, and the rents must be apportioned.

Solicitor for the Plaintiff: Mr. *J. Fortune.*

Solicitors for the Defendant: Messrs. *Bridges & Co.*

(1) 1 Sw. 337. (2) 1 J. & H. 651.

In re SANDERS' TRUSTS.

Will—Construction—Gift over—"Unmarried"—Transmissible Interests—Issue.

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1866
March 12.

Gift by will of a sum of stock to *A.* for life, remainder to any wife he might thereafter marry for life or widowhood, remainder to the children of *A.* absolutely; and in case *A.* should die *unmarried and without issue*, then, from and after his decease, to *B.*, *C.*, and *D.*, share and share alike, or to such of them as should be living at *A.'s* death, his, her, or their executors administrators and assigns absolutely.

A. survived *B.*, *C.*, and *D.*, and died a widower, without ever having had a child:—

Held, that upon the death of *A.* the representatives of *B.*, *C.*, and *D.* took the legacy in equal shares.

The Court declined to read the word "and" as "or;" but treating the word "unmarried" as a word of flexible meaning, decided that it here meant "without leaving a widow," in order to give expression to the whole clause.

The doctrine of *Sturgess* v. *Pearson* (1), was held to apply to the interests of *B.*, *C.*, and *D.*, although contingent, following *Wagstaff* v. *Crosby* (2). *Willis* v. *Plaskett* (3) disapproved.

The word issue was held to mean issue before described.

THIS was a Petition.

Samuel Sanders, by his will, dated the 4th day of June, 1813, bequeathed to trustees the sum of £20,000 stock upon trust to pay the dividends to his son, *Charles Sanders*, for life, and after his decease to pay the same unto any wife with whom he might thereafter intermarry for her life, in case she should continue his widow; and, from and after her decease or second marriage, upon trust to assign and transfer the said sum of stock and the dividends thereof unto and amongst all and every or such one or more of the children of the said *Charles Sanders* as he should by will appoint; and, in default of appointment, upon trust to transfer and pay the same unto and amongst all and every the children of the said *Charles Sanders*, share and share alike, on their respectively attaining twenty-one; and, in case of the death of any or either of them before he, she, or they should attain twenty-one, unmarried and without issue, then he declared that the share of him,

(1) 4 Madd. 411. (2) 2 Coll. 746. (3) 4 Beav. 208.

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her, or them so dying should go to the survivors or survivor of them, his, her, or their executors, administrators and assigns; and, in case of but one child only, then the whole thereof to be transferred and paid to such only child on his or her attaining the age of twenty-one years. And he directed that during his her or their respective minorities, the dividends, interest, and annual proceeds of the respective share or shares of such child or children, or a proportional part thereof, should be applicable for his, her, or their maintenance and education and support, as the trustees should in their discretion think fit. The will then contained the following clause :—

"Provided always, that, in case my said son, *Charles Sanders*, shall happen to die *unmarried and without issue*, then I direct that the said last-mentioned sum of £20,000 stock shall, from and after his decease, be transferred and paid by the said trustees unto my son, *Samuel Sanders*, and my two daughters, *Susannah* and *Maria*, share and share alike, or unto such of them as shall be living at the time of his decease, his, her, or their executors, administrators, and assigns absolutely."

The will also contained a specific bequest of residue.

The Testator died on the 10th of July, 1815, leaving four children, *Samuel*, *Charles*, *Susannah*, and *Maria*. *Maria* died in 1826; *Susannah* died in 1851; *Samuel* died in 1859; and *Charles* died in July, 1865, a widower, but never having had a child.

Upon his death the representatives of *Samuel*, *Susannah*, and *Maria* claimed the sum of stock in equal shares; and the residuary legatees resisted the claim on two grounds—first, that *Charles* did not die "unmarried;" and, secondly, that neither of the three were "living at the time of his decease."

Mr. *W. M. James*, Q.C., and Mr. *George Miller*, for the Petitioner, the representative of *Samuel*:—

If it be necessary, the Court will read "unmarried *and* without issue" as "unmarried *or* without issue," in order to give expression to the alternative event and avoid surplusage. But the better

view would seem to be, as laid down by Mr. *Jarman* (1), to construe the expression "unmarried" as used in its less-accustomed sense—namely, as "not married at the time." The old rule was to read the word in its ordinary signification, as meaning "never having been married;" but the result of modern cases is the other way: *Mitchell* v. *Colls* (2), affirmed in the House of Lords as *Clarke* v. *Colls* (3).

The second point is covered by actual authority: *Sturgess* v. *Pearson* (4).

In *Day* v. *Day* (5) the Court refused to read "and" as "or," as that would have caused a legacy to lapse, but no such reason exists here.

[The VICE-CHANCELLOR:—Although the class of brother and sisters who are to take are determinable at the death of *Charles*, may it not be argued that they are not to take until after an indefinite failure of issue?]

The word issue must be held to mean the class of issue before defined by the will, namely, the children of *Charles* who should attain twenty-one, or die under twenty-one leaving issue.

Mr. *Amphlett*, Q.C., and Mr. *Langworthy*, for the representatives of *Susannah* and *Maria*:—

The word "issue" means issue before defined: *Cormack* v. *Copous* (6).

The word "unmarried," in this instance, means "unmarried at the death;" but if the Court should hold that it means "never having been married," then the question arises whether the decision of the Master of the Rolls in *Seccombe* v. *Edwards* (7) can be supported. The Master of the Rolls seems to have thought that the cases of *Brownsword* v. *Edwards* (8), *Maberly* v. *Strode* (9), and *Bell* v. *Phyn* (10), were overruled by *Grey* v. *Pearson* (11). But

(1) 1 Jar. on Wills, 3rd ed. 487.
(2) Joh. 674.
(3) 9 H. L. C. 601.
(4) 4 Madd. 411.
(5) Kay, 703.
(6) 17 Beav. 397.
(7) 28 Beav. 440.
(8) 2 Ves. Sen. 243.
(9) 3 Ves. 450.
(10) 7 Ves. 453.
(11) 6 H. L. C. 61, 106.

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in *Grey* v. *Pearson* there were special reasons for the decision arrived at. The question is, whether the Court is not at liberty to change "and" into "or," or "or" into "and," when it sees that some very unreasonable result will follow if this is not done: *Brownsword* v. *Edwards* (1); *Fairfield* v. *Morgan* (2).

The case is on all fours with *Sturgess* v. *Pearson*, except that here the gift to the three is contingent. But the gift, though contingent, is not the less a transmissible interest: and the principle of *Sturgess* v. *Pearson* equally applies: *Wagstaff* v. *Crosby* (3).

Mr. *A. Smith*, for one of the residuary legatees:—

The gift over fails, and must sink into the residue.

Sturgess v. *Pearson* (4) does not apply. That was the case of a vested interest, which was not to be divested until the particular event happened. Here the whole gift is contingent, and when the time arrived there was no one to take.

The word "unmarried" must mean "never having been married," and the words "and without issue" are mere surplusage.

There being a life estate given to the wife, and then a gift to the three, or to such of them as should be living at *Charles's* death, the gift can take effect only if the three are living at his death; if they are not, there is no gift at all. If the gift to the children of *Charles* vested at twenty-one, then the words "die without issue" must mean "die without ever having had a child." But if (as it is contended) it vested on the birth of each child, then the words "die without issue" mean an indefinite failure of issue: *Pride* v. *Fooks* (5).

Mr. *Rolt*, Q.C., Mr. *Cotton*, and Mr. *Hemming*, for parties in the same interest:—

It would be an unjustifiable construction to change "and" into "or," because, whatever sense may be given to the word "unmarried," this would lead to an absurdity. For example, if the clause were read "a bachelor *or* without issue," the gift over

(1) 2 Ves. Sen. 243.
(2) 2 B. & P. (N. R.) 38.
(3) 2 Coll. 746.
(4) 4 Madd. 411.
(5) 3 De G. & J. 252.

would take effect immediately on the death of *Charles*, leaving a widow, but without issue, and would be inconsistent with the previous life estate given to the widow.

Sturgess v. *Pearson* followed *Harrison* v. *Foreman* (1), in both of which cases the gifts were vested. *Wagstaff* v. *Crosby* stands alone. It is the only case in which the doctrine of *Sturgess* v. *Pearson* has been applied except to vested gifts, and the whole foundation of the doctrine is the existence of an absolute vested gift to all the class before the condition of survivorship. No reasoning is given in the report, and even if the case be law, the present case is distinguishable, because the gift to the three is simply contingent, while in *Wagstaff* v. *Crosby* it was one of two alternatives, which exhausted all the possibilities. Here, there is one event, namely, the death of *Charles*, leaving a widow, but no children, in which the corpus would beyond all question fall into the residue.

Mr. *G. M. Giffard*, Q.C., and Mr. *Speed*, for another party in the same interest:—

The former part of the will shews that the testator knew how to express himself properly when he wished to limit himself to children. Issue means issue indefinitely.

Mr. *William Barber*, for another residuary legatee.

Mr. *Bardswell*, for a party in the same interest:—

Willis v. *Plaskett* (2) is opposed to *Wagstaff* v. *Crosby*.

Mr. *Druce*, for the trustee of the will.

Mr. *W. M. James*, in reply:—

The distinction which has been drawn between a vested and a contingent interest is only a play upon words. If there are two alternative gifts exhausting the whole interest, the interests, though contingent, are as much transmissible as if they were vested. The authorities of *Sturgess* v. *Pearson* and *Wagstaff* v. *Crosby* rule the case.

(1) 5 Ves. 207. (2) 4 Beav. 208.

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SIR W. PAGE WOOD, V.C.:—

I think, that but for the intermediate interest given to the wife of *Charles Sanders*, the case would not admit of any serious doubt. The scheme of the will, which is very clear, is first a gift of an interest to *Charles Sanders* for life, then to any wife whom he might leave, for her life, then to any children he might have, to be vested interests in them, payable at twenty-one, and in the event of the death of any of them under twenty-one unmarried and without issue, to go to the survivors or survivor; with a trust, during the minorities of his children, for their maintenance.

Then follows this clause, "Provided always, that in case my said son *Charles* shall happen to die unmarried and without issue." Stopping there, it is evident that the testator first contemplates his son *Charles* having a wife and children. Then he says, "You may find him at his death with a wife and children," and gives a life interest to the wife and absolute interests at twenty-one to the children. But, he proceeds, "if you find him with neither, I direct that the said sum of stock shall, from and after his decease, be transferred to *Samuel*, *Susannah*, and *Maria*."

By "after" he of course means "immediately after" his son *Charles's* decease. So that no question of remoteness can possibly arise.

Then there are two ways in which these words might be construed. On the one hand, it is said that "unmarried" means "wifeless," and that the phrase "dying unmarried and without issue" means "dying leaving neither wife nor children surviving." The other construction is, that "unmarried" means "never having been married," which would render the words "and without issue" superfluous: and hence it is said the word "and" must be read as equivalent to "or."

Now the Master of the Rolls decided in *Seccombe* v. *Edwards* (1) that the Court was not at liberty to change "and" into "or;" but it is not necessary for me, in the view I take, to consider whether, after *Grey* v. *Pearson* (2), the older authorities of *Brownsword* v. *Edwards* (3) and others should be upheld.

The rule laid down by the House of Lords in *Clarke* v. *Colls* (4)

(1) 28 Beav. 440.
(2) 6 H. L. C. 61.
(3) 2 Ves. Sen. 243.
(4) 9 H. L. C. 601.

is that the word "unmarried" is of flexible meaning, and is to be construed with reference to the plain intention of the testator, notwithstanding that some words may thereby be rendered superfluous. Lord *Cranworth*, after admitting the well-known canon of construction, that effect, if possible, is to be given to every word used, says, "It is true that, examining the language critically, we find that the word "unmarried," interpreted as I think it must be interpreted, is redundant. It is implied in the other words used. But the question is, whether the rule of construction to which I have referred is of so inflexible a nature that we must defer to it, even though it might cause family property to go in a manner entirely at variance with the ordinary habits and usages of mankind. I think not." He therefore held the word "unmarried" to mean "unmarried at the time of death," notwithstanding that such a construction would render the word itself superfluous.

Now, although "unmarried," in its primary sense, means "never having been married," yet it is plain that the intention of the testator here was, "In case you find my son *Charles* in such a position as that neither the provision made for his wife nor that made for his children is capable of taking effect, then the gift to my other son and daughters is to take effect."

It is not necessary for me to go so far as to consider the case which has been suggested, namely, that of the wife of *Charles* surviving him. Mr. *James* would contend that, even in such a case, where the contingency on which the gift over was to take effect did not arise, the gift over would nevertheless take effect. But I confess I think, if the wife had survived, there would have been great difficulty in supporting the validity of the gift over on the authority of *Avelyn* v. *Ward* (1), and that class of cases.

It appears to me that, upon a will constructed as this is, where the testator first of all makes a gift which exhausts the whole interest, and then comes to consider another state of circumstances altogether, that I cannot neglect any of the contingencies upon which the gift over is to take effect.

The real question is whether I can support the disposition of the testator's legacy upon the other principle of construction,

(1) 1 Ves. Sen. 420.

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namely, by holding the word "unmarried" as meaning "unmarried at the death of the tenant for life."

The two cases to which I refer on this point are *Doe* v. *Rawding* (1) and *Doe* v. *Cooke* (2). It is quite true that in neither of those cases was it necessary to have laid down what was there said; but at the same time I think the observations are of importance, coming from Judges of so great weight as Lord *Ellenborough*, Lord *Tenterden*, Mr. Justice *Bayley*, and Mr. Justice *Holroyd*, who all took the same view. The limitation in *Doe* v. *Rawding* was to the testator's daughter, then under age, in fee, but "in case she should die under the age of twenty-one years, unmarried, and without lawful issue," then over. The daughter survived the testator, married, and died under twenty-one, without issue, but leaving her husband surviving; and Lord *Tenterden*, then Chief Justice *Abbott*, says, "As the daughter did not die unmarried, I am of opinion that the fee remained in her at the time of her death, and passes to her heir-at-law. The event upon which the devise over was to take effect, namely, the death of *M. W.* unmarried, under the age of twenty-one, has not happened." And Mr. Justice *Bayley* says, "I apprehend that the word *unmarried* may either mean never having been married at all, or without having at the time husband or wife. It is used in the latter sense by the Legislature in the 3 & 4 W. & M. c. 11. A widower has been held to be an unmarried man within this statute."

In the same sense was the decision in *Doe* v. *Cooke*, where the gift was of leaseholds to *T. C.* for life, and afterwards to his children; but in case *T. C.* should die "an infant, unmarried, and without issue," then over. *T. C.* attained twenty-one, married, and died some forty-two years after the date of the will, leaving his wife surviving, but never having had any issue. Lord *Ellenborough* held that this was a gift upon one contingency, attended with two qualifications: "Had *T. C.* left a wife, and had he died an infant, leaving no children, the testator might have intended that in such event the widow should be benefited by taking her share under the statute of distributions with the next of kin, or that *T. C.* should be able to make a testamentary disposition in her favour; meaning also that, if he left children,

(1) 2 B. & A. 441. (2) 7 East. 269.

they should have the estate in preference to the wife; that if he left neither wife nor children at his death during his minority, the property should go over; but that, if he arrived at the age of twenty-one, he should have a power to dispose of it, though he left neither wife nor children." In that instance there was no gift to the wife, as there is here, which makes the case all the stronger

In the former case of *Doe* v. *Rawding*, Mr. Justice *Holroyd* further says, "It has been argued that the word *unmarried* is to be taken in a restrained sense, as meaning 'never having been married at all.' The word, however, must be construed in such a sense as will make it operative, and not in such a sense as will make it nugatory. If the word *unmarried* be taken to mean 'without leaving a husband,' the word is not rendered inoperative by the following words, *and without issue;* and in that case it is wholly unnecessary to alter the word *and* into *or;* and there is nothing on the face of the will to shew that it was the intention of the testator to use it in the other sense."

That is exactly the point that occurs here. The Court will not, at all events, without the most absolute necessity, change *and* into *or*. But unless you do change *and* into *or*, or read *unmarried* as signifying "unmarried at the death," the clause *and without issue* is wholly nugatory. Therefore, where, following Lord *Cranworth's* observation in *Clarke* v. *Colls*, there is nothing in the will to interfere with that canon of construction which insists upon effect being given, where it is possible, to every word of the will, and where you find a flexible word like *unmarried*, and the choice is between giving to that flexible word its less common signification, which is perfectly consistent with the rest of the will, and changing *and* into *or*, I think the authorities of Lord *Ellenborough* and Mr. Justice *Holroyd* must be followed, where the cases were even stronger than the present.

With respect to the transmissible nature of the interest, I think the case is governed by *Sturgess* v. *Pearson;* nor can you fritter away the doctrine of that case so far as to say that, because there is a previous gift to another class who would have taken in another contingency, which did not arise, therefore this gift is not to be transmissible.

No doubt, if words of survivorship are introduced, the class that

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are to take must be modified to some extent by the event. If, for example, there be a gift which exhausts the whole interest, and then, upon the occurrence of a particular event, a substituted gift, to *A.*, *B.*, and *C.*, and the survivors and survivor of them, if *A.*, *B.*, and *C.*, are all dead when the event occurs, their representatives will take in equal shares, but if the survivor of *A.*, *B.*, and *C.* survives the event, he will take the whole. There is no distinction in this respect between *Sturgess* v. *Pearson* (1) and *Harrison* v. *Foreman* (2).

The case of *Wagstaff* v. *Crosby* (3), before Vice-Chancellor *Knight Bruce*, seems to have proceeded on this doctrine. The Court sees an intention to give, in one event in one direction, and in another event in another; and what difference can it make whether you call these vested interests defeasible in a certain event, or contingent and transmissible interests, except perhaps this, that the Court is less disposed to divest a vested estate than to say the estate does not vest till the event occurs one way or the other?

The case of *Willis* v. *Plaskett* (4) appears to be very slightly reported. In that case, where there was a gift to *A.* for life, with remainder, in case *A.* died unmarried (which happened), between *B.* and *C.*, "or such of them as should be then living," and the lawful children of such of them as should be then dead, "for the share of the deceased father or mother only," and *B.* and *C.* died in the lifetime of *A.*, *B.* leaving issue, *C.* leaving none, Lord *Langdale* thought there was no estate vested till the death of *A.*, and, therefore, that the representatives of *C.* took nothing. I think that, although the interests were in a sense contingent, they were nevertheless transmissible.

It appears to me, therefore, that the rule in *Sturgess* v. *Pearson* and *Wagstaff* v. *Crosby* must apply, and that the representatives of *Samuel*, *Susannah*, and *Maria*, take in equal shares.

The costs of all parties will come out of the fund.

Solicitors for the Petitioner: Messrs. *Mason & Withall.*

Solicitors for the Respondents: Messrs. *Marson, Dadley, & Cronin*; Messrs. *Boys & Tweedies*; Messrs. *Symes, Sandilands, & Humphry*; Messrs. *Johnston, Farquhar, & Leech*; Messrs. *Merriman & Pike*; Messrs. *Rickards & Walker*; Messrs. *Druce & Sons.*

(1) 4 Madd. 411. (2) 5 Ves. 207. (3) 2 Coll. 746. (4) 4 Beav. 208.

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Feb. 24, 26; *March* 19.

Husband and wife—Curtesy—Wife's equity—Separate use—Insolvency of husband—Election by wife, effect of; 1, *as to realty;* 2, *as to personalty.*

A., upon his marriage, settled real estate of small value, in remainder after the decease of the survivor of himself and his wife, to the use of all the children of the marriage as tenants in common in tail, with cross remainders. He also settled personal estate, after the death of the survivor of himself and his wife, for the benefit of all the children of the marriage in equal shares.

By his will *A.* gave an annuity of £1000 a-year to *C.*, one of his daughters (married at the date of the will), for life, for her separate use, with a clause of forfeiture upon assignment or incumbrance of the annuity, and declared that the provision made by that his will for his daughter *C.* should be accepted by her in full for any share or interest she might have in the property comprised in the settlement.

In *A.*'s lifetime *C.*'s husband became insolvent. At *A.*'s death there were several children of *C.*'s marriage.

C. elected (her husband concurring) to take the annuity under the will, and to renounce all benefit under the settlement:—

Held, that the effect of *C.*'s election upon the share of personalty comprised in the settlement (which was outstanding in trustees, and subject to her equity), was to defeat the interest of the assignee of her husband in that fund.

Held, further, that *C.*'s election could not defeat the interest of the assignee in the real estate comprised in the settlement, and that upon her joining with her husband in barring the estate tail, she was bound to give compensation, out of the annuity, to the extent of the reality taken by the assignee.

THIS was a Petition praying for the advice and direction of the Court.

The late *Henry* Viscount *Maynard*, by his marriage settlement, dated the 26th of December, 1810, conveyed certain freehold hereditaments situate in *Thaxted* and *Lindsell*, *Essex*, comprising about eighty-two acres, to trustees and their heirs, to the use of the settlor for life, remainder to the use of *Mary Rabett* the younger (afterwards Viscountess *Maynard*) for life; remainder to the use of all and every or such one or more of the children of the marriage as the settlor should by deed or will appoint, and in default of appointment, to the use of all and every the children and child of the marriage as tenants in common in tail general, with cross remainders; remainder to the use of

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Viscount *Maynard* and his heirs. The settlor also thereby covenanted to surrender certain copyholds situate in *Lindsell*, comprising about seventy-two acres, to be held on the same trusts; and also to assign and transfer into the names of the trustees a sum of £9000 Consols, and a sum of £1256 5*s.* *East & West India Dock Company* stock, to be held by them in trust, after the death of the survivor of Viscount and Viscountess *Maynard*, for all and every the children and child of the marriage as the settlor should by deed or will appoint; and in default of appointment, if there should be two or more children of the marriage (which happened), the same trust funds and the income thereof were to be for the portions of such two or more children, to be divided between them in equal shares.

The sum of £9000 Consols was transferred into the names of the trustees, who, in 1825, sold it, and advanced the proceeds, consisting of £8415, to Lord *Maynard*, on the security of certain lands, which he charged with the repayment of the same. The Dock Company stock was transferred into, and was still standing, in the names of the trustees.

By his will, dated the 29th of April, 1843, Lord *Maynard*, the above settlor, gave and bequeathed all his leasehold estates and all his personal estate to trustees, upon trust to realize and convert the same as therein mentioned; and to stand possessed of the proceeds upon trust, after payment of debts and funeral and testamentary expenses and legacies, to apply the surplus, either in discharge of incumbrances affecting his freehold and copyhold estates thereby devised, or in the purchase of other freeholds or copyholds in the county of *Essex*, to be settled to the uses hereinafter declared. The testator then gave an annuity of £1000 to his daughter, *Charlotte Mary*, wife of the Hon. *Augustus F. C. M. Capel*, for her life, and annuities of like amount to his other daughters for their respective lives; and directed that the several annuities thereinbefore bequeathed to his daughters should be for their respective separate use and benefit, independently of any husbands or husband with whom they might have intermarried or might intermarry; their receipts alone to be sufficient discharges; and that if any or either of the said annuitants should assign, dispose of, or otherwise part with, or incumber at law or in

equity the annuity bequeathed to them respectively, the annuities with respect to which the same should happen should immediately thenceforth cease and determine, and be absolutely void to all intents and purposes.

Testator then devised all his real estates whatsoever and wheresoever (except a mansion-house) to the use of trustees for 1000 years, and subject thereto to the use of his son, the Hon. *Charles Maynard*, and his assigns during his life; remainder to the use of his first and every other son successively in tail male; remainder to the use of his first and every other son successively in tail general; remainder to the use of his first and every other daughter in tail male; remainder to the use of his first and every other daughter in tail general; remainder to the use of his daughter, the said *Charlotte Mary Capel*, and her assigns for life; remainder to the use of her first and every other son in tail male, with divers remainders over. The testator then declared that the provision made by that his will for his said son and daughters respectively should be accepted by them respectively in full for any share or interest they respectively might have in the property comprised in his marriage settlement, and that they respectively should execute such instrument or instruments, and do such other acts as his trustees for the time being might think requisite or necessary, for relinquishing their respective shares or interests in the property thereby settled; it being his express wish and intention that the same settlement, so far as regarded his said son and daughters, and any interest thereby given or limited to or in trust for them respectively, should to all intents and purposes whatsoever be annulled and made void.

At the date of the will the testator had a son, *Charles Henry Maynard*, and four daughters, the said *Charlotte Mary Capel*, *Emma Ives*, wife of *Jeremiah Ives*, *Catherine Harriet Maynard*, and *Augusta Julia Maynard*.

In the year 1850, and again in 1855, *Augustus Capel* took the benefit of the *Insolvent Debtors Acts*, and all his estate and interest were now vested in *H. H. Stansfeld*, as formerly provisional, and now (under the *Bankruptcy Act*, 1861) official assignee.

In 1857, *Mary* Viscountess *Maynard* died. On the 2nd January, 1865, *Charles Henry Maynard* died, leaving a widow surviving

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him, and two children, *Frances Evelyn Maynard*, and *Blanche Maynard*, now infants. In February, 1865, *Catherine Harriet Maynard* died without having been married; on the 19th of May, 1865, the testator died, and on the 21st of May, 1865, *Jeremiah Ives* died. At the testator's death there were five children, issue of the marriage of Mr. and Mrs. *Capel*.

The bill in *Griggs* v. *Gibson* was filed by a legatee for administration of the personal estate of Lord *Maynard*. The second suit of *Maynard* v. *Gibson* was instituted by the infant *Frances Evelyn Maynard*, by her next friend, as the first tenant in tail of the real estate, for the purpose of making the Plaintiff a ward of Court, and to have the trusts of the will carried into execution under the decree of the Court.

A decretal order was made in the causes on the 25th of July, 1865, by which it was amongst other things ordered that the annuities mentioned in the will should be paid, "the said annuitants performing the several conditions in the said will or codicil mentioned."

The trustees of the will now petitioned the Court, admitting that the state of the assets was such as to justify them in paying the annuities, but stating that a difficulty had arisen respecting the payment to the three daughters, arising from the above direction; that the three ladies had served notices upon the Petitioners for payment, offering to renounce all interest under the settlement in the terms of the direction; but that the Petitioners were advised that it was doubtful whether these notices would be a sufficient relinquishment of the shares of the ladies in the settled property, and whether they ought not to be respectively required to execute proper disentailing deeds, and to convey their shares.

The Petition prayed for a declaration that the said notices were a sufficient fulfilment of the direction in the will of the testator contained as to the relinquishment by the testator's said daughters of their shares and interests in the property comprised in the settlement; and if not, then that the Court would declare what other acts and deeds (if any) the Petitioners ought to require to be done by the testator's said daughters, or any other persons or person, to entitle the said annuitants to demand and be paid by the Petitioners the said annuities given to them by the will.

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Augustus Capel was willing to join with his wife in the disentailing deed, if the Court should be of opinion that a deed was necessary.

The value of Mrs. *Capel's* interest as tenant in common in tail of the estates settled in 1810 was stated to be not more than £80 a-year. The real estates devised by the will, on the other hand, were worth at least £11,000 a-year.

Mr. *Rolt*, Q.C., and Mr. *Faber*, for the Petitioners:—

The questions are, whether Mrs. *Capel*, being a married woman, can elect; and, if she cannot, whether her election is not a condition precedent, failing the fulfilment of which the gifts to her by will of the realty, or of the personalty, or of both, must fail.

Mr. *W. M. James*, Q.C., and Mr. *Freeling*, for the Hon. Mrs. *Capel*:—

As to the real estate, this is not a condition precedent; it is a condition subsequent by way of defeazance. Mrs. *Capel* has relinquished her interest under the settlement, and has accepted the gifts under the will. The trustees are bound to pay the annuity.

Conditions precedent are odious to the law, and the Court is not compelled to hold this a condition precedent: *Bennett* v. *Bennett* (1), *Egerton* v. *Earl Brownlow* (2).

The annulling of the settlement, in conformity with the testator's wish, is, of course, an impossibility. But not only has Mrs. *Capel* power to elect, but, if she elects to take under the will and to relinquish her estate tail, the life estate of the husband and his assignee, and the interests of the issue in tail, are bound by her relinquishment, the whole estate being in her: *Lady Cavan* v. *Pulteney* (3); *Gretton* v. *Haward* (4); *Barrow* v. *Barrow* (5); *Lady E. Thynne* v. *Earl of Glengall* (6); and *Roper*, Husband and Wife (7).

Still, if the Court should think fit to decree compensation to the assignee, it is easy to provide it out of the annuity, for that is

(1) 2 Dr. & Sm. 266, 277.
(2) 4 H. L. C. 1.
(3) 2 Ves. 560, 561.
(4) 1 Sw. 409, 413 (n).
(5) 4 K. & J. 409.
(6) 2 H. L. C. 131.
(7) Vol. i. p. 27, 28, and (n) by Jac.

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given without restraint upon anticipation, though accompanied by the clause of forfeiture in certain events; and a release may be ordered of an amount equivalent to what would be taken by the assignee.

As to the personalty, there can be no question, the settlement funds being in the hands of trustees, and therefore subject to the wife's equity.

Mr. *M. W. Hunter*, for the Hon. *A. Capel.*

Mr. *G. M. Giffard*, Q.C., and Mr. *Wickens*, for the Hon. Mrs. *Ives.*

The Petition was ordered to stand over, to serve the assignee (who had only been served with the Petition) with copy of the decretal order.

Mr. *Osborne*, Q.C., for the assignee:—

An arrangement has been proposed, but the assignee cannot abandon any right; he is not bound to elect. No election on the part of this lady can bind either her real or her personal estate.

The personal estate to which Mrs. *Capel* was entitled under the settlement is vested in her husband, although the fund has not, up to the date of this Petition, been reduced into possession. Subject, therefore, to the wife's equity, the husband and his assignee are entitled to the fund, and the Court may not see fit to settle the whole.

But, supposing that election be held to prevail as to the personal estate, it is impossible that the interest in the real estate can be influenced by the wife's election: *Brodie* v. *Barry* (1); *Pulteney* v. *Lord Darlington* (2); *Roper*, Husband and Wife (3).

SIR W. PAGE WOOD, V.C.:—

At all events, I think this lady is entitled to elect as to the personalty. That distinction struck me before; but, as regards the real estate, there is certainly very great difficulty. The real estate to be relinquished fortunately turns out to be very small. As regards the personal estate, the Court is enabled to say,

(1) 2 V. & B. 127, 134. (2) 7 Bro. P. C. 546, 547. (3) Vol. i. p. 28 (n).

that the fund is not in the wife's possession, nor in her husband's possession in her right, it is still outstanding in the trustees of the settlement; and, accordingly, the interest of the husband and his assignee, being subject to the equitable doctrine, must fail altogether if the wife's interest calls upon her to claim the property. But here the wife's interest requires that she should elect to take the gift of the £1000 annuity. There is nothing to prevent her making that election. The consequence is, that upon her election her interest in the personalty under the settlement is defeated. But the right of election is an equitable doctrine, and does not affect any legal estate. It has been contended that the husband's right must fail if the wife elects not to take—"for his estate must rise and fall with hers." That is reported to be Lord *Loughborough's* view of Chief-Justice *De Grey's* argument (1). But as to real estate, I confess I do not see how such a doctrine can apply.

Mr. *James*, in reply:—

The testator's intention must rule the construction, and following that construction the Court will say: "You shall not take what the testator did not intend you should take." This lady was married at the date of the testator's will.

Mr. *Amphlett*, Q.C., and Mr. *Walford*, for the infant tenant in tail.

Mr. *Everitt*, Mr. *Schomberg*, and Mr. *Briggs*, for other parties.

SIR W. PAGE WOOD, V.C.:—

It strikes me that this is not a question of construction, except so far as it may be necessary to decide whether it is a case of election, or a condition. I think, after Mr. *James's* argument, I cannot do more than deprive this lady of the value of her share in the realty. If she elects to take the annuity, she must give up to the residuary estate as much of it as will compensate the interest of the assignee in the realty under the settlement.

After that I do not see that I can lay hold of any estate that

(1) 2 Ves. 560.

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may possibly come to her hereafter. Compensation must be made to the extent of her interest in the realty under the settlement, and no further.

MINUTES:—Declare that *Charlotte M. Capel*, wife of *Augustus F. C. M. Capel*, *Emma Ives*, widow, and *Augusta Julia Maynard*, are respectively bound to elect between the benefits which they respectively take under the settlement of the 26th of December, 1810, and the benefits which they respectively take under the testator's will and codicils; but as regards *Charlotte M. Capel*, her election is to be subject and without prejudice to the interest of *H. H. Stansfeld*, as the assignee under the insolvency of *A. F. C. M. Capel*, during the life of the said *A. F. C. M. Capel*, in the undivided share of the real estate comprised in the said settlement to which the said *Charlotte M. Capel* is entitled under the said settlement as tenant in tail.

And the said *Charlotte M. Capel*, *Emma Ives*, and *Augusta Julia Maynard*, by their counsel electing to take under the will, and the said *Augustus F. C. M. Capel*, by his counsel concurring in such disentailing deed as hereinafter mentioned, order the said *Augustus F. C. M. Capel* and *Charlotte M.*, his wife, and the said *Emma Ives* and the said *Augusta Julia Maynard*, to execute or join in executing a proper deed or deeds to be settled by the Judge for barring all the respective estates tail of the said *Charlotte M. Capel*, *Emma Ives*, and *Augusta Julia Maynard*, of and in the real estate comprised in the settlement, and for conveying all their respective shares and interest in such real estate under the said settlement to the Petitioners, their heirs and assigns, as trustees of the will and codicils, to be held by them upon the trusts by the said will and codicils declared respecting the testator's residuary real estate thereby devised; but subject as to the share and interest of the said *Charlotte M. Capel* to all such estate and interest as the said *H. H. Stansfeld*, as such assignee as aforesaid, is entitled to therein during the life of the said *Augustus F. C. M. Capel*, in respect of the marital right of the said *Augustus F. C. M. Capel* during the life of his said wife, or as tenant by the curtesy in the event of his surviving her.

And order that the Petitioners, as such trustees as aforesaid, do, during the joint lives of *Augustus F. C. M. Capel* and *Charlotte M.* his wife, retain out of the annuity of £1000 a-year given to the said *Charlotte M. Capel* by the said will, an annual sum equal to the net rents and profits of the undivided share of the said *Charlotte M. Capel* under the said settlement in the real estate therein comprised taken by the said *H. H. Stansfeld*, as such assignee as aforesaid, the annual sum retained to be applied by the Petitioners as such trustees as aforesaid as parts of the rents and profits of the said testator's residuary real estate.

And order that the said Sir *Edward C. Kerrison*, Bart., who, as devisee and executor of the will of Sir *Edward Kerrison*, Bart., deceased, the last surviving trustee of the said settlement, is now the sole trustee of the said settlement, do stand possessed of the respective fourth parts or shares of the said *Charlotte M. Capel*, *Emma Ives*, and *Augusta Julia Maynard*, under the said settlement, in the personal estate comprised in or subject to the trusts of the said settlement upon trust for the Petitioners as trustees of the said will and codicil, to be held by the said Petitioners, when paid over to them, upon the trusts by the said will and codicils declared respecting the general personal estate.

The Petitioners to be at liberty, out of the rents and profits of the testator's real estates, to pay the several annuities of £1000 to the said *Charlotte M. Capel*, after the retainer thereout hereinbefore directed; of £1000 to the said *Emma Ives;* and of £1000 to the said *Augusta Julia Maynard;* and to be allowed the same in passing their accounts.

The costs of all parties to be taxed as between solicitor and client, and paid by the Petitioners out of the testator's personal estate.

Solicitors for the Petitioners: Messrs. *Walker & Jerwood.*

Solicitors for the Respondents: Messrs. *Hunter, Gwatkin, & Co.;* Messrs. *G. H. & E. H. Ellis;* Messrs. *F. H. & H. H. Walford;* Messrs. *Brabant, Capron, & Dalton;* Mr. *A. H. Clapham.*

JACKSON *v.* IVIMEY.

Practice—Motion to dismiss for want of prosecution—Interrogatories by Defendant.

The circumstance that a Defendant has filed interrogatories for the examination of the Plaintiff does not suspend or interfere with his right to have the bill dismissed for want of prosecution, although the Plaintiff's enlarged time for filing an answer to the interrogatories has not expired at the time of making the motion.

THIS was a motion on behalf of Defendants to dismiss a bill for want of prosecution.

The answer was filed on the 1st of November last, and the Plaintiffs' time for filing a replication—setting down the cause to be heard, setting down motion for decree, or serving an order for leave to amend, under *Consolidated Order* xxxiii., rule 10, art. 1—expired on the 24th day of January.

On the 25th of January, the Plaintiffs applied by summons for leave to enlarge the time for filing a replication or obtaining an order for leave to amend, but the application was refused by the Chief Clerk on the 25th of January, and afterwards, upon adjournment into Court, by His Honour on the 13th of February.

No special application for leave to amend had been made.

On behalf of the Plaintiffs it was stated that on the 23rd of December, 1865, the Defendants filed a concise statement and interrogatories for the examination of the Plaintiffs, and on the

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20th of January, 1866, an order was made on the Plaintiffs' application for one month's time for the Plaintiffs to file their answer to the interrogatories. On the 17th of February the Chief Clerk granted a fortnight further time for the Plaintiffs to file their answer, which time would expire on the 3rd of March.

Mr. *Willcock*, Q.C., and Mr. *Phear*, for the motion:—

The application of the 13th of February was refused by the Court on the express ground that the delay of the Plaintiffs in answering the Defendants' interrogatories was no reason for enlarging their time for obtaining an order to amend. The Plaintiffs had allowed the interval between the 25th of January (the date of the refusal of the order by the Chief Clerk) and the 13th of February (the hearing of the summons by the Vice-Chancellor) —nearly three weeks—to expire without making any application for an order to amend. They had taken no step, except to obtain further time to answer Defendants' interrogatories.

Mr. *E. K. Karslake*, for the Plaintiffs:—

The fact of the Defendants having filed interrogatories suspends their right to move to dismiss.

The concise statement being in the nature of a cross suit, it is important for the Plaintiffs that they should be able to settle their answer to the Defendants' interrogatories before they settle their amendments. In answer to the motion, the Plaintiffs ask for leave to amend the bill within two days from the 3rd March, they undertaking to speed the cause.

The VICE-CHANCELLOR said that the Defendants had not, by filing interrogatories, precluded themselves from the right of moving to have the bill dismissed.

The order to be made must be the common order, that the Plaintiffs do within fourteen days file replication, or, in default, that the bill be dismissed with costs for want of prosecution, and that the Plaintiffs pay the costs of this motion.

Solicitors for the Plaintiffs: Messrs. *Bell, Steward, & Lloyd*, agents for Mr. *Edmund Carlyon*, St. Austell.

Solicitor for the Defendants: Mr. *T. Gill, Jun.*

TRINDER *v.* TRINDER.

V.-C. W.
1866
March 5.

Will—"Shares"—Will speaking from death—Wills Act (1 *Vict. c.* 26), *s.* 24.

Bequest by will made in 1857, of "my shares in the *Great Western Railway*."

At the date of the will testatrix had no shares, strictly speaking, in the *Great Western*, or any other railway company; but she was possessed of *Wilts & Somerset* stock of the *Great Western Railway*, and also of preference and other stock, which was increased by further purchases of stock in the same company, between the date of the will and her death:—

Held, that all the *Great Western* and *Wilts & Somerset* stock in the possession of the testatrix at her death passed under the bequest.

17 Sim. 68
16 Ch. 150
151, 2,
20 Eq. 301
7 Ves. 7
719, 723,

HESTER ANN HULBERT, widow, by her will, dated the 10th of April, 1857, made the following bequest:—

"I bequeath to my brother, *Frank Smith Trinder*, the sum of £300, secured upon the bond of the trustees of the *Melksham Paving Act*, and the securities for the same; also my shares in the *Great Western Railway*."

Testatrix died on the 6th of December, 1865.

At the time of making her will testatrix had no shares, properly so called, in the *Great Western Railway*, or in any other railway company. She had, in January, 1846, purchased five £50 shares in the *Wilts, Somerset, & Weymouth Railway*. Under the provisions of the "*Great Western Railway Act*, 1851," the *Wilts & Somerset* undertaking became vested in the *Great Western*, and the shares were converted into *Wilts & Somerset Railway* stock of the *Great Western Railway Company*. In 1853 the testatrix purchased some "Preference £5 per Cent. Stock, Redeemable," of the *Great Western Railway*. After the date of her will she acquired some "Fixed 4½ per Cent. Stock," some "Consolidated Stock," and some "4½ per Cent. Perpetual Irredeemable Stock," all in the *Great Western Railway Company*.

The bill alleged that the testatrix was in the habit of using the term "railway shares," to designate her railway stock, and that it was so described in the entries made in her cash-book, and

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that the stock certificate for the consolidated *Great Western Railway* stock was endorsed by the testatrix with these words:—

"For *F. S. Trinder.*"

Mr. *G. M. Giffard*, Q.C., and Mr. *Wickens*, for the Plaintiff, contended that all the *Great Western* stock in the possession of the testatrix at the time of her death passed under this bequest. She was in the habit, like many other people, of speaking of her railway stock as "railway shares," and she clearly intended to give that which was in her possession; and the effect of the *Wills Act*, s. 24, was to sweep into the bequest all the stock acquired after the date of the will, unless a "contrary intention" appeared on the will, which did not in this case: *Goodlad* v. *Burnett* (1); *Lady Langdale* v. *Briggs* (2); *Doe* v. *Walker* (3).

Mr. *Daniel*, Q.C., and Mr. *J. Pearson*, for parties beneficially interested in the residue, contended that evidence was not admissible for the purpose of shewing the sense affixed by the testatrix to the word "shares:" *Millard* v. *Bailey* (4). But even assuming that "shares" could be read as meaning "stock," it must be confined to stock of that undertaking, and would not include *Wilts & Somerset* stock, which was not stock of the *Great Western Railway* proper. As to the after-purchased stock, the common rule of ademption would apply if the testatrix had shares at the date of her will, and afterwards purchased stock.

SIR W. PAGE WOOD, V.C.:—

Railway stock is so analogous to shares in all respects that, on it being clearly shewn that this testatrix had no railway shares at the date of her will, she must be held to have been describing something in her possession, so as to pass this stock. She was clearly pointing to something she had at the time of her will; and by the application of s. 24 of the *Wills Act*, which draws down the bequest to the time of her death, all the shares or stock then in her possession (being a species of property capable of augmentation), would be included. With respect to the *Wilts*

(1) 1 K. & J. 341.
(2) 8 D. M. & G. 391.
(3) 12 M. & W. 591.
(4) Law Rep. 1 Eq. 378.

& Somerset stock, the undertaking was handed over to and has become the property of the *Great Western Railway*. The testatrix drew her dividends at their office. It is under their management, and the stock is their stock to all intents and purposes. The Plaintiff is, therefore, entitled to all the stock held by the testatrix at the time of her death.

Solicitors: Messrs. *Lewis, Wood & Street.*

KELLY *v.* MORRIS.

Injunction—Copyright—Directory.

The compiler of a directory or guide-book, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and re-publishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results.

THIS was a motion on behalf of the Plaintiff, who is the owner and publisher of the "*Post-office London Directory*," for an injunction to restrain the publication of the "*Imperial Directory of London*," 1866, on the ground that it was a mere piracy of the Plaintiff's work.

The "*Post-office London Directory*" was originated by an inspector of letter-carriers in the *General Post-office* named *Critchett*, and the copyright of the work was purchased by the Plaintiff in 1836 from *Critchett's* representatives. Since that time the Plaintiff has brought out a new edition every year, making considerable alterations and improvements both in the contents and in their arrangements, the work as it stands at present containing twelve divisions or directories, and, exclusively of advertisements, 2,483 pages, indexed externally in a manner invented for the Plaintiff, and first used by him in his directory. The Defendant, who is a publisher in *Moorgate Street Buildings, E.C.*, commenced, in 1862, the publication of a "Business Directory," containing the

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names and addresses of persons in trade and business only. In January of the present year he published a bulky volume called "*The Imperial Directory of London*," adding various sections, such as "court," "street," "conveyance," "banking," "official," "postal," &c., making in all fourteen subdivisions of the work. The case made by the bill was, that this work was a mere piracy of the Plaintiff's Directory of 1865, both in the general plan and design, and also in the details. Numerous instances were adduced in which errors contained in the Plaintiff's Directory of 1865 were reproduced in the Defendant's work, and also cases in which, where changes had occurred in the names of streets, or the occupants of particular houses had died or removed since January, 1865, the information given in the Plaintiff's Directory for 1865 had been adopted by the Defendant without the necessary correction.

The Defendant had filed a long affidavit in opposition to the motion, in which, after stating the publication by him of his "Business Directory" for the first time in 1862, he explained the way in which he had obtained the information published in that work as follows:—After cutting a map of *London* into about sixty divisions, he gave a separate division to each canvasser, directing him to call upon every person, and report on separate printed forms the name, trade, and address of every person carrying on business in the particular district, and where the canvasser could not see the occupier of the premises, then he was to take the name from any signboard, brass-plate, business-card, or other available source of information. In this way the Defendant was enabled to publish the names of about 100,000 persons in trade or business. The "Business Directory" was again published in 1863 and 1864 at a considerable loss on the first two editions, but with a slight profit on the third (that for 1865, published in 1864). This small profit, as the Defendant stated, encouraged him to extend his operations, and to bring out the "Imperial Directory," which should comprise street, conveyance, postal, and other sections, after the model of "*Robson's London Directory for* 1830." In obtaining the information for the new sections the Defendant acted upon a similar principle to that which had guided him in taking the names of persons in business whom his canvassers were unable to see, viz., he took such information from any source "where the

persons had made it public at their own expense for their own benefit." In the case of private residents the Defendant was of opinion that their names belonged to themselves alone in the first instance, and that a person living in a private residence had a right to privacy "until he either forfeited it for the consideration of publicity, or gratuitously gave it to the public through some recognised medium of publicity." In such cases the Defendant considered that "the name belonged to the public, and that the publisher merely held it in trust for a purpose, receiving for his trouble any benefit he could make of the information; but that the right of using that information belonged to the public as soon as the information was made public." Following out this theory, any person might go round with a list of names already published and ask permission to render the work of publication more complete by reproducing it, and if any error had been made in the first publication, it rested with the original owners of the names to point out the error when submitted to them for permission to reproduce. As, however, the canvassers were seldom able to see private residents to shew them the printed names, the Defendant estimating the total number of people whose names appeared in the several directories (including that of the Plaintiff) at 40,000, had issued 48,000 circulars, asking the residents to fill up a form with their name and address for publication in the "Imperial Directory." After taking the tradesmen's names from his own "Business Directory" and making a list of them, Defendant incorporated into that list all the names to be found in the other directories, "of people who had given their names for public use," and directed the canvassers to go round with the lists, and leave one of the 48,000 forms at the residence of each person named, calling for it on the following day, and when it was filled up, correcting the list by such form when necessary.

It was admitted that one of the canvassers (who had been since discharged by the Defendant) had done his work carelessly, and had not taken the trouble to make the necessary inquiries from house to house, so that most of the errors identical with those of the Plaintiff to be found in the Defendant's Directory would be thus accounted for. On the other hand, several instances were adduced in which the information contained in the Plaintiff's

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Directory for 1865 had been corrected and largely supplemented by the Defendant in his "Imperial Directory." The MS. was produced, and Messrs. *Spottiswoode*, the printers, had made an affidavit verifying the MS. produced as that from which the "Imperial Directory" was printed, and stating that from the variety of handwritings the work of printing was very difficult.

Mr. *Rolt*, Q.C., and Mr. *Speed*, for the Plaintiff, in support of the motion:—

Upon the Defendant's own shewing he has been guilty of appropriating the information contained in the Plaintiff's Directory, and obtaining the benefit of many years of incessant labour and expense, so as to deprive the Plaintiff of the fruit of his industry and ability. The arrangement of the streets, the external index, and many other peculiarities invented by the Plaintiff, have all been adopted by the Defendant: while the re-publication, without correction, of numerous trifling inaccuracies in the spelling of names, in initials of residents, &c., &c., and the retention, without alteration, of many particulars which were correct in January, 1865, but from changes of residence, the general election, death, &c., are no longer so, shew conclusively that the Defendant has made a servile copy and blind repetition of the Plaintiff's work, without giving himself the trouble of bestowing that amount of independent time, thought, and labour upon the subject-matter open to common observation and inquiry, which is necessary in order to avoid the imputation of piracy: *Lewis* v. *Fullarton* (1); *Bramwell* v. *Halcomb* (2); *Jarrold* v. *Houlston* (3); *Spiers* v. *Brown* (4); *Hotten* v. *Arthur* (5).

Mr. *Daniel*, Q.C., and Mr. *Renshaw*, for the Defendant, contended that there had been no unfair or improper use of the Plaintiff's work. Information which was given in any directory for 1865, or previous years, became public property, and was a fact which any one compiling a directory for 1866 was entitled to use and adopt, so long as he did not servilely copy it: *Cary* v. *Kearsley* (6). So far from doing this, the Defendant, with directories of previous years

(1) 2 Beav. 6.
(2) 3 My. & Cr. 737.
(3) 3 K. & J. 708.
(4) 6 W. R. 352.
(5) 1 H. & M. 603.
(6) 4 Esp. 168.

before him as the foundation of his inquiries, had sent out his canvassers with the lists, and was enabled to supplement, and, in many instances, correct both *Webster* and the Plaintiff. The Defendant had thus bestowed independent time, labour, and expense upon the matter, and he had in no way infringed the Plaintiff's copyright by thus taking the information given in former directories as the starting-point for his own inquiries and improvements. If any inaccuracies or errors contained in the Plaintiff's Directory of 1865 reappeared in the Defendant's Directory, that was amply accounted for by the careless and imperfect way in which some of the canvassers employed by the Defendant (and since discharged) had performed their appointed work. With respect to the arrangement of the streets, that was not a thing in which the Plaintiff could assert a copyright, and in any case mere imitation of arrangement was not illegal unless the *animus furandi* were distinctly proved. That had not been done, nor had there been that unfair use or "extraction of the vital part" of the Plaintiff's work, *Murray* v. *Bogue* (1), which would justify the Court in stopping the sale of the Defendant's work; especially having regard to the tendency to restrict rather than increase the granting of injunctions in cases of contested copyright: *M'Neill* v. *Williams* (2).

SIR W. PAGE WOOD, V.C.:—

I think there must be an injunction in the same terms as that which was granted in *Lewis* v. *Fullarton* (3), viz., to restrain the publication of the parts which are pirated without waiting till all the parts which have been pirated can be distinctly specified. The Defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island (the illustration put by Mr. *Daniel*) he

(1) 1 Drew. 353. (2) 11 Jur. 344. (3) 2 Beav. p. 14.

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must go through the whole process of triangulation just as if he had never seen any former map, and, generally, he is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So in the present case the Defendant could not take a single line of the Plaintiff's Directory for the purpose of saving himself labour and trouble in getting his information. The Defendant, from his description of the way in which he had in the first instance compiled his "Business Directory," seems to have known exactly what he might do. No doubt the expense of procuring information in a legitimate way is very great. The Defendant himself has told us so, and also that it was not for some years that he was able to make it pay. But the Defendant goes on in his affidavit to propound a most extraordinary doctrine as to the right of publicity in the names of private residents, who had, as he expressed it, "given their names for public use." What he has done has been just to copy the Plaintiff's book and then to send out canvassers to see if the information so copied was correct. If the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied from the Plaintiff's book was reprinted bodily, as if it was a question for the occupier of the house merely, and not for the compiler of the previous directory. Further than this, the Defendant tells us that he had a number of new agents, and that one of them had performed his part of the work carelessly, thus at once shewing how easy it would be on the system adopted by the Defendant for any negligent agent to send back his list all ticked as if correct, without having taken the trouble to make a single inquiry.

With respect to the "Street Directory," in which the Plaintiff has adopted a very ingenious form of arrangement, which is to be found in no other directory that has been produced, except the Defendant's, I hold it to be clearly established—from the identity of mistakes in the numbers of houses and the names of their occupants, and also in the breaks and intersections in the streets—that the Defendant has taken his list of streets from the Plaintiff's

Directory. The work of the Defendant has clearly not been compiled by the legitimate application of independent personal labour, and there must be an injunction to restrain the publication of any copy of the Defendant's work containing the portions called the "Street" and "Court" Directories, with liberty for the Defendant to apply, when he shall have expunged from such portions all matter copied from the Plaintiff's work.

The motion as to the other portions of the Directory was directed to stand over, to enable the Defendant to meet the case upon certain points which had been raised by the Plaintiff's affidavits, in reply; but the Defendant on the following seal day (March 8th), submitted to a perpetual injunction against publication of all portions of his Directory, except the "Trade" and "Business" divisions.

Solicitors for the Plaintiff: Messrs. *Benham & Tindell.*
Solicitors for the Defendant: Mr. *Wontner.*

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ACCRUER.

By a marriage settlement funds were settled upon the wife for life, with remainder to the children of the marriage in equal shares, "to be a vested interest at their ages of twenty-one years," with a gift over to the husband in the event of all the children dying under twenty-one, and a reversion to the settlor in the event of there being no child born, but no clause of survivorship and accruer as to shares of children dying under twenty-one.

There were five children, of whom four attained twenty-one, and the fifth died an infant:—

Held, that the whole fund vested in the four children who attained twenty-one. *In re Colley's Trusts*, 496

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AGENT.

The duties of the agent of a limited company being in the nature of personal service, and as such incapable of being enforced in equity, the Court refused to restrain the directors from acting upon or enforcing the resignation of *A*, whose management and agency was made a prominent condition in the prospectus on the formation of the company, and expressly

provided for by the articles of association.

In refusing to grant the injunction, the Court put the directors upon an undertaking not to take advantage, in proceedings at law to recover the amount due on *A's* shares, of his resignation, which was alleged by him to have been wholly conditional on his being relieved from all liability in respect of shares. *Mair* v. *Himalaya Tea Company.* 411

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1. The Court will not, as a general rule, as between tenant for life and remainder-man, allow compensation by way of apportionment for loss of income, occasioned by the sale of stock, sold to complete a purchase under a power to invest in real estate, being delayed beyond the time fixed for completion by the contract for purchase; even although such delay may have been unavoidable.

Therefore where a tenant for life petitioned to have recouped out of *corpus* the loss of dividends sustained by her by reason of delay in completion and selling out of stock for that purpose, occasioned by difficulties arising on the title of the estate purchased, the Court refused to allow such compensation. *Freeman* v. *Whitbread.* 266

2. Where a tenant for life, under a settlement of an estate *pur autre vie*, renewed the lease for lives to himself and his heirs, purchased the fee, made a parol demise for a year, but died before the end of the current half-year, and a remainderman entered and received the rent, on a bill by the executor of the tenant for life against the remainderman:—

Held, that the rent must be apportioned under the 11 Geo. 2, c. 19, s. 15. *Mills* v. *Trumper.* 671

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ARBITRATION.

There is no original jurisdiction in the Court of Chancery in the nature of a writ of prohibition, to restrain an arbitrator from proceeding to make an award: the only ground on which the court will interfere, prior to the award being made, is such, if any, as may be afforded by the conduct of the parties.

The repudiation by a railway company of a contract for the completion of their line, followed by seizure of the works under an order of a Colonial Court:—

Held, a waiver on their part of the right to proceed by arbitration under the same contract, with reference to the question of the legality of the seizure and all matters involved in and dependent upon such question. *Pickering* v. *Cape Town Railway Company.* 84

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ATTORNMENT.

A., in 1861, granted an underlease to *B*, for twenty-one years from Michaelmas, 1861, at the yearly rent of £50. In 1864 he granted an underlease of the same premises to *C.* for twenty-one years from Michaelmas, 1863, at the same rent. *B.* never attorned to *C.*:—

Held, inasmuch as there was no attornment, that the demise to *C.* did not pass the reversion to him, but only an *interesse termini*; and that in order to establish *C.*'s underlease, a surrender by *B.* to *A.*, and not to *C.*, was the effectual and proper course. *Edwards* v. *Wickwar.* 403

BANKRUPTCY.

The option to take a lease is comprised under the words "personal estate and effects, present and future," in the *Bankrupt Law Consolidation Act*, 1849, s. 141. Such option passes to the assignees in bankruptcy, and may be sold by them and assigned to the purchaser, unless the lease is to contain a proviso against alienation. *Buckland* v. *Papillon.* 477

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BEST RENT.

Section 2 of the *Leases and Sales of Settled Estates Act*, requiring the best rent to be reserved, is modified by section 5 of the same Act extended by section 5 of the amended Act, which allow the Court to permit the surrender of existing leases and the grant of new leases of the property surrendered.

The best rent means the best that under all the circumstances can reasonably be had, taking into account the value of the lease surrendered. *In re Rawlins' Estate.* 286

BIDDINGS, OPENING.

See OPENING BIDDINGS.

BILL OF EXCHANGE.

A bill of exchange, the drawer and acceptor of which became bankrupt before it fell due, was indorsed by the *Leeds Banking Company* to Messrs. *P.*, of *Liverpool*, payable "in need" at a bank in *London*. When it fell due, it was presented by Messrs. *P's* agent in *London* at the banks notified for payment by the acceptor and indorser, and dishonoured at both banks. Messrs. *P's.* agent then sent notice of the dishonour, by post, to Messrs *P.*, at *Liverpool*; and they, by post, sent notice to the liquidator of the *Leeds Banking Company*, which was being wound up. Upon claim against the *Leeds Banking Company*, under the winding-up, in respect of the bill:—

Held, that the indorsement "in need" constituted the bank notified "in need" agents of the indorsers for payment only, and not agents for notice of dishonour generally; and therefore that notice to them of dishonour by the acceptor was not notice to the indorsers.

That presentation for payment to an indorser is not *per se* notice of dishonour by the acceptor; and,

That the rule allowing a day for each step in presentation and notice applies only as between the parties to a bill, and does not give a day for communication between the agent of the holder of a bill and such holder who resides at a distance; and, therefore,

The Court disallowed the claim. *In re Leeds Banking Company, Ex parte Prange.* 1

BOARD OF HEALTH.

See SEQUESTRATION.

BREACHES AFTER DECREE.

See DAMAGES, 1.

BROTHEL.

See IMMORAL PURPOSE.

BUILDING, COVENANT AGAINST.

A covenant against building entered into by a purchaser of land with the vendor (who was also owner of adjoining lands), his heirs and assigns, runs with the land, and may be enforced in equity by a subsequent purchaser of part of such adjoining lands. The vendor after selling part of the adjoining lands cannot release the covenantor from his covenant.

The person seeking to enforce such a covenant in equity must shew that he will sustain substantial injury from the breach of it; but the injury need not be so great as is required to justify the interference of the Court in cases of obstruction of ancient lights.

A person who has acquiesced in breaches of such a covenant is not debarred of his remedy in equity, provided the breaches have not caused substantial injury.

All the persons entitled to the benefit of such a covenant need not be parties to or represented in a suit to enforce it. *Western* v. *MacDermot.* 499

BUILDING LEASE.

See LANDS CLAUSES ACT, 1.

CAIRNS' ACT.

See DAMAGES, 1, 2, 3.
DAMAGE, MEASURE OF
STOPPAGE IN TRANSITU.

CANCELLATION.

See PURCHASER FOR VALUE.

CERTIFICATE OF SUCCESSION DUTY.

See SUCCESSION DUTY ACT.

CHAMBERS, PROCEEDINGS IN.

See COSTS, 4.

CHAMPERTY.

A conveyance, whether voluntary or for valuable consideration, of property, which the grantor has previously conveyed by a deed voidable in equity, is not void on the ground of champerty.

The right of instituting a suit to set aside a conveyance on equitable grounds passes by the grantor's subsequent conveyance of the same property, and the grantee under the subsequent conveyance may institute such suit without making the grantor a co-plaintiff.

A. having executed a conveyance of real estate to *B.*, which was liable to be set aside on equitable grounds, afterwards made a voluntary settlement of the same property in trust for himself for life, with remainder to his children as he should appoint, and in default of appointment to all his children who should attain twenty-one, or (being daughters) should marry, in equal shares:—

Held, that the infant children of *A.* could maintain a bill, making *A.* and the trustees of the settlement Defendants, to set aside the conveyance to *B.* *Dickinson* v. *Burrell.* *Ann Dickinson* v. *Burrell.* *Stourton* v. *Burrell.* 337

CHANCEL.

See CHARITY.

CHARGE ON REALTY.

See REVOCATION BY CODICIL.

CHARGING ORDER.

A charging order, under sect. 14 of 1 & 2 Vict. c. 110, creates such an incumbrance as will determine a life interest, limited to a person until he executes some assignment or act whereby the interest may be incumbered. *Montefiore* v. *Behrens.* 171

CHARITY.

A testatrix bequeathed £600 to trustees upon trust to empower the minister and churchwardens of the parish of *H.* to receive the dividends and employ them in keeping in good repair, order, and condition for ever, the monument of her mother in *H.* church, the vault in *H.* aforesaid, in which she was interred, and an ornamental window which she directed her trustees to place in the church of *H.* in memory of her mother, and to apply any surplus of such dividends towards keeping in repair and ornamenting the chancel of the said church:—

Held, that the gift for the repair of the vault (which was in the churchyard) was not a charitable gift, and fell into the residue; but that the gift for the other purposes was a good charitable bequest; and the Court, being of opinion that it would be impossible to ascertain by inquiry what portion of the fund should be attributed to each purpose, divided the fund equally as between the several purposes. *Hoare* v. *Osborne.* 585

See GRAMMAR SCHOOL, 1, 2.
MORTMAIN ACT.

CHARITY TRUSTEES.

See LANDS CLAUSES ACT, 2.

CHILDREN.

See VESTING, TIME OF.

"CHILDREN," CONSTRUCTION OF.

See LEGITIMACY.

CLASS.

See CONVERSION.

CODICIL.

See REVOCATION BY CODICIL.

CODICIL, REVOCATION BY.

See CONVERSION.
REVOCATION OF CODICIL.

COMPANIES ACT, 1862.

Sections 138, 147, 148.

1. The Court will not at the instance of contributories interfere with a voluntary winding-up by ordering a winding-up by or under the supervision of the Court, except where the resolution for winding-up voluntarily has been obtained by fraud, or by an inequitable overbearing of the rights of a dissentient minority by improper influence. *In re London and Mercantile Discount Company.* 277

Section 165.

2. The 165th section of the *Companies Act*, 1862, which confers power on the Court to compel payment by directors and officers of companies in respect of misfeasance or breach of trust relating to the affairs of the company, does not apply as against the executors of a deceased director.

Where acts of directors or other officers sought to be inquired into are the acts of a body of persons, some of whom are dead—*quære*, whether the Court can proceed against the survivors under the 165th section, or whether a suit is not necessary. *Feltom's Executors' Case.* 219

Section 206.

3. The power of making contracts in writing, signed by their agents, conferred by the 41st section of the *Joint Stock Companies Act*, 1856, upon Companies registered under that Act, is "a right or privilege acquired under" that Act within the meaning of the 206th section of the *Companies Act*, 1862, and is consequently not affected by the repeal of the former Act. *Prince* v. *Prince.* 490

Sections 85, 98, 158.

See Winding-up, 1, 2, 4.

COMPANIES CLAUSES ACT.

See Promoters, Contract by.

CONDITIONS OF SALE.

COMPANY.

See Companies Act, 1862.
Contributory, 1, 2, 3.
Costs, 1.
Deposit, return of.
Lands Clauses Act, 2, 3.
Promoters, Contract by.
Register, rectification of.
Sale of Railway.
Transfer of Shares.
Ultra Vires.
Winding-up, 1, 2, 4.

COMPENSATION, LIEN FOR.

See Sale of Railway.

COMPENSATION MONEY.

See Lands Clauses Act, 1.

COMPOSITION.

On a bill by a bankrupt, who had compounded with his creditors for eight shillings in the pound, and whose bankruptcy had been annulled, the Court set aside, with costs, a secret bargain, whereby the bankrupt agreed to pay one creditor in full, in consideration of his becoming surety for payment of the composition. *Wood* v. *Barker.* 139

COMPOSITION DEED.

See Estate and Effects.
Trustees' Costs.

CONCEALMENT.

See Conditions of Sale.
Fiduciary Relation.

CONDITIONS OF SALE.

A condition of sale, providing that no requisition or objection should be made in respect of a specified underlease, or any other underlease prior to a certain specified date :—

Held, not to protect against requisitions in respect of an underlease, prior to the date mentioned, not specified in the conditions, and within the knowledge of the vendor at the time. *Edwards* v. *Wickwar*. 68

See OUTGOINGS.
RESCIND, RIGHT TO.

CONDUCT OF SALE.

See COSTS OF PURCHASER.

CONFIRMATION.

See MORTMAIN ACT.

CONSIDERATION.

See CONTRIBUTORY, 3.

CONSOLIDATED ORDER XIX. r. 4.

See DEPOSITIONS IN BANKRUPTCY.

CONTINGENT GIFT.

See GIFT TO SEVERAL, OR SUCH AS SURVIVE *A*.

CONTINGENT LEGACY.

See MAINTENANCE.

CONTRACT.

See COMPANIES ACT, 1862 .. 3.

CONTRACT BY PROMOTERS.

See PROMOTERS, CONTRACT BY.

CONTRACT TO TAKE SHARES.

See CONTRIBUTORY, 1.

CONTRARY INTENTION.

See POWER, TESTAMENTARY.

CONTRIBUTORY.

1. The *Leeds Banking Company* having decided upon issuing their reserved shares, addressed a circular to the shareholders, offering them one new share for every five shares held by them, to be paid for on a day named, and requesting to know whether in the event of any shares remaining they would wish to have any additional shares. *Addinell* was offered four shares in respect of the twenty held by him, and in answer to the circular he agreed to take his proportion of allotment and asked for additional shares if he could have them. The reply stated that the directors had allotted him four extra shares in addition to the four shares already accepted by him. In this reply there was a further clause not contained in the first circular, that if the amount were not paid by the day named the shares would be forfeited. Nothing further was done and no payment was made in respect of any of the shares:—

Held, that a contract was constituted in regard to the first four shares by the offer and the acceptance, but the contract was not complete as to the four extra shares by reason of the clause of forfeiture which was a new term added to the contract and not accepted by payment within the time specified. *Addinell's Case*. 225

2. A shareholder in a company received a notice that on non-payment by him of arrears of calls on a certain day, his shares "would be forfeited without further notice." He also knew that the question of winding-up the company was under consideration. Two days before the day appointed for the payment of the arrears, he went to the company's office, paid the arrears on a few of his shares, and took a receipt, saying that on the rest he should submit to a forfeiture. The directors, at a board meeting, five days afterwards, examined the list of defaulters, and declared the shares of some of them, whom they considered as not solvent, to be forfeited; but they did not declare the shares of this

particular shareholder to be forfeited, and they continued to treat him as the holder of the whole number of shares. The articles of association of the company provided that "in the event of non-payment at the time and place appointed by the notice, any share might thereupon be forfeited without any further act to be done by the company":—

Held, that the shares upon which the arrears were not paid up, were not absolutely forfeited by the non-payment, and that the company's right of option remained; and, as the company had declared their intention of retaining the shareholder on the list, that he must, upon winding-up, be held to be a contributory in respect of the full number of shares. *Bigg's Case.* 309

3. Where a company is formed for working a patented machine, it is not *ultra vires* to purchase the patent.

A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration, provided such real consideration be not inconsistent with the deed.

If a case of fraud is alleged in respect of the formation of a company—*Semble*, it must be set up by bill, and not by proceedings under a winding-up order.

A holder of paid up shares held not to be a contributory. *Leifchild's Case.* 231

CONVERSION.

Gift of residue upon trust to convert and "divide the same into as many equal parts or shares as shall be equal in number to the number of my children living at my decease, or born in due time afterwards, or such of them as may happen to have died in my lifetime, leaving issue; and I give one of such shares to each of my sons who shall attain twenty-five or die in my lifetime, leaving issue, and, on trust, to retain each of my daughters' shares, to be settled to their separate use, the shares of those dying without issue to go to the survivors." By his codicil the testator revoked all and every provision in his will in favour of his daughter *Ellen* or her issue in her own right, or by right of survivorship, or in any other manner whatsoever:—

Held, that the children did not take as a class, and that there was an intestacy as to *Ellen's* share; but that *Ellen* was not excluded from sharing as one of the next of kin.

There being four children, and the heir having by deed-poll ratified the testator's will, in order to make it effectual as to a certain Scotch estate:—

Held, that the one-fourth share of the Scotch estate was undisposed of, and passed under the will of the heir as part of his personal estate. *Ramsay* v. *Shelmerdine.* 129

See POWER OF SALE.

COPY OF ACCOUNTS.

See COSTS, 3.

COPYHOLDS.

See ENFRANCHISEMENT.

COPYRIGHT.

The compiler of a directory or guide-book, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results. *Kelly* v. *Morris.* 697

CORPUS.

See PARTNERSHIP, 2.
TENANT FOR LIFE AND REMAINDERMAN.

COSTS.

1. Where a railway company takes land which is the subject-matter of a suit, and it becomes necessary to serve the parties to the suit with a Petition occasioned by the land being so taken, all the costs of such parties, including the cost of their appearance, must be paid by the company. *Haynes* v. *Barton.* 422

2. Where legacies were made payable out of residue which was insufficient, the fund being in Court, the legatees were held entitled to their costs out of the residuary fund. *In re Jarman's Trusts.* 71

3. When a Receiver, appointed in a suit, passes his accounts in Chambers, and the same solicitor appears both for the receiver and one of the parties to the suit, only one copy of the account can be allowed between them on taxation. *Sharp* v. *Wright.* 634

4. In an administration suit by a residuary legatee, other residuary legatees, served with notice of the decree and having liberty to attend the proceedings, will not be allowed their costs of attending the taking of the accounts in Chambers, unless the Plaintiff and the accounting Defendant employ the same solicitor, and in that case will be allowed one set of costs between them. *In re Taylor's Estate. Daubney* v. *Leake.* 495

See Lands Clauses Act, 1.
Production, 1.
Tenant for Life and Remainderman.
Trustees' Costs.
Winding-up, 3.

COSTS OF LEGATEES.

See Separate Use, 2.

COSTS OF PURCHASER.

A Defendant, to whom the conduct of a sale under the decree of the Court is given, will not be ordered to pay in the first instance, where there are no funds in Court, the costs of a purchaser who is discharged from his purchase on the ground of bad title. *Mullins* v. *Hussey.* 488

COVENANT.

See Damages.
Release.
Settlement.
Waiver of Covenant.

COVENANT AGAINST PARTICULAR TRADE.

The underlessee of a person who has covenanted not to carry on a particular trade on the demised property, will be restrained from carrying it on, although such covenant was not contained in the original lease, but only in an assignment thereof; and although the underlessee had no actual notice of it when he took his underlease; and, *semble*, even though he had no constructive notice. So also as to an assignee of the underlessee.

To a suit to enforce such a covenant, the original covenantor is not a proper party, if he has parted with all his interest in the property and is not any way in fault. *Clements* v. *Welles.* 200

See Waiver of Covenant.

COVENANT TO SETTLE FUTURE PROPERTY.

Gift to daughters for life, with remainder to the child or children of such daughters, as they should appoint; in default of appointment, equally. And on the death of such of the said daughters after attaining the age of twenty-one years as should die without issue, her share to be paid to her personal representative:—

Held, that "issue" meant issue who would be entitled under the former gift, *i.e.*, children. "Personal representative" meant executor or administrator.

The husband of one of the daugh-

ters, after the death of the testatrix, by postnuptial deed covenanted with a trustee that all the real and personal property which might thereafter at any time during the joint lives of himself and his wife devolve on her, should be held and disposed of by her as her separate property, notwithstanding coverture :—

Held, that the before-mentioned property, on the wife's death without children, was not subject to the covenant, and did not pass by her will, but went to her husband as general administrator. *Grafftey* v. *Humpage* (1 Beav. 46), distinguished. *In re Wyndham's Trust.* 290

COVENANT NOT TO BUILD.

See BUILDING, COVENANT AGAINST.

COVENANT RUNNING WITH THE LAND.

See COVENANT AGAINST PARTICULAR TRADE.
BUILDING, COVENANT AGAINST

CRIMINAL ACT.

See TRUSTEE, LIABILITY OF

CURRENT RENT.

See OUTGOINGS.

DAMAGES.

1. The Court has no power under Sir *Hugh Cairns' Act*, upon motion in a cause, after a decree for specific performance of a covenant, to add an order for assessing damages for breach of the covenant.

Such an order would be a supplemental decree upon facts which had subsequently occurred. *Corporation of Hythe* v. *East.* 620

2. Where a Plaintiff has succeeded in shewing that at the filing of the bill he was entitled to an injunction to restrain an infringement of his patent, the Court will not at the hearing refuse him an inquiry as to damages, under Sir *H. Cairns' Act*, although the patent has expired pending the litigation.

Remarks on the form of an inquiry as to damages in cases of infringement of a patent. *Davenport* v. *Rylands.* 302

3. If an injunction can be supported to restrain the progress of dilapidations not completed at the date of the filing of the bill, then Sir *Hugh Cairns'* Act (21 & 22 Vict. c. 27) gives jurisdiction to assess damages in respect of such parts of the dilapidations as have been already effected at that date. *Hindley* v. *Emery.* 52

See STOPPAGE IN TRANSITU.

DAMAGE, MEASURE OF.

On an inquiry whether any and what damage has accrued to the Plaintiffs from the unlawful use by the Defendant of their trade-mark, the onus lies on the Plaintiffs of proving some special damage by loss of custom or otherwise, and it will not be intended in the absence of evidence that the amount of goods sold by the Defendant under the fraudulent trade-mark would have been sold by the Plaintiffs but for the Defendant's unlawful use of the Plaintiff's mark. *Leather Cloth Company* v. *Hirschfield.* 299

DECREE.

See LOST POLICY.

DECREE, PLEA OF.

See INROLMENT.

DEDICATION.

See WAY, DEDICATION OF

DELIVERY.

See STOPPAGE IN TRANSITU.

DEMURRER TO PART OF BILL.

See PLEADING.

DEPOSIT OF POLICY.

See ORDER AND DISPOSITION.

DEPOSIT, RETURN OF.

The promoters of a company issued a prospectus stating that deposits would be returned if no allotment of shares was made. Several deposits were made, but no allotment ever took place:—

Held, that this statement did not bind moneys, consisting mainly of these deposits, standing in a bank to the credit of the company, with a trust or lien in favour of the depositors, as against creditors of the company; and demurrer allowed to a bill by depositors, seeking to restrain creditors from attaching the moneys under a garnishee order.

A bill may be filed by depositors upon application for shares in an abortive company, in which no allotment of shares has been made, on behalf of themselves and all the other depositors. *Mosely* v. *Cressey's Company*. 405

DEPOSITIONS IN BANKRUPTCY.

An order of course may be made, under Cons. Ord. xix. Rule 4, to read at the hearing of a cause proceedings in bankruptcy, including depositions. *Lake* v. *Peisley*. 173

DESCRIPTION.

See WILL SPEAKING FROM DEATH.

DETERMINABLE LIFE ESTATE.

See HUSBAND AND WIFE.

DEVISE OF PURCHASED ESTATE.

See MARSHALLING.

DIRECTORS.

See TRANSFER OF SHARES.

DIRECTORS' MISFEASANCE.

See COMPANIES ACT, 1862 .. 2.

DIRECTORY.

See COPYRIGHT.

DISCHARGE.

See EXECUTOR DE SON TORT.

DISCOVERY.

See DOCUMENTS.

DISCRETION.

See TRANSFER OF SHARES.

DISENTAILING DEED.

See PAYMENT OUT OF COURT.

DISMISSAL FOR WANT OF PROSECUTION.

The circumstance that a Defendant has filed interrogatories for the examination of the Plaintiff does not suspend or interfere with his right to have the bill dismissed for want of prosecution, although the Plaintiff's enlarged time for filing an answer to the interrogatories has not expired at the time of making the motion. *Jackson* v. *Ivimey*. 693

DISTRIBUTION, PERIOD OF.

Testator directed his trustees to apply the rents of a certain real estate towards the maintenance and education of his daughters (naming seven), until his youngest daughter should attain twenty-one. He then directed the property to be sold and the pro-

ceeds to be divided equally amongst his daughters, share and share alike; "but if any of his said daughters should die before his youngest daughter arrived at twenty-one years, her or their share or shares to be divided amongst his surviving daughters, share and share alike; but if any of his said daughters should marry and die before the said youngest daughter attained twenty-one and leave a child or children, it or they should receive their mother's share equally among them":—

Held, that there were no vested interests until the youngest daughter attained twenty-one:

Held further, that by the words "mother's share" was meant the share which the mother would have taken had she survived the period of distribution. *In re Hunter's Trusts.* 295

DIVORCE IN SCOTLAND.

See LEGITIMACY.

DOCUMENTS.

A Defendant may decline to answer th usual interrogatory as to documents. It is sufficient if he expresses his willingness to make the affidavit prescribed by the new practice, and it makes no difference whether the exception as to documents is a single exception or is included among others. But if a Defendant professes to answer the interrogatory he must do so fully.

The introduction of interrogatories as to documents should now be avoided. *Piffard* v. *Beeby.* 623

See PRODUCTION, 1, 2.

DOMICIL.

See LEGITIMACY.
PORTIONS, DOUBLE.

DONATION WITH CONDITIONS.

See GRAMMAR SCHOOL, 1.

DOUBLE PORTIONS.

See PORTIONS, DOUBLE.

EDUCATION.

See INFANT.

ELECTION BY WIFE.

A., upon his marriage, settled real estate of small value, in remainder after the decease of the survivor of himself and his wife, to the use of all the children of the marriage as tenants in common in tail, with cross remainders. He also settled personal estate, after the death of the survivor of himself and his wife, for the benefit of all the children of the marriage in equal shares.

By his will *A.* gave an annuity o £1000 a year to *C.*, one of his daughters (married at the date of the will), for life, for separate use, with a clause of forfeiture upon assignment or incumbrance of the annuity, and declared that the provision made by that his will for his daughter *C.* should be accepted by her in full for any share or interest she might have in the property comprised in the settlement.

In *A.'s* lifetime *C.'s* husband became insolvent. At *A.'s* death there were several children of *C.'s* marriage.

C. elected (her husband concurring) to take the annuity under the will, and to renounce all benefit under the settlement:—

Held, that the effect of *C.'s* election upon the share of personalty comprised in the settlement (which was outstanding in trustees, and subject to her equity), was to defeat the interest of the assignee of her husband in that fund:

Held, further, that *C.'s* election could not defeat the interest of the assignee in the real estate comprised in the settlement, and that upon her joining with her husband in barring the estate tail, she was bound to give compensation, out of the annuity, to the extent of the realty taken by the assignee. *Griggs* v. *Gibson, Maynard* v. *Gibson.* 685

ENFRANCHISEMENT.

It is no sufficient objection to the title of the vendor of an enfranchised copyhold that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord.

Semble, the non-admittance of a surrenderee leaves in the surrenderor an interest which exists only for the benefit of the lord, and does not leave any beneficial interest in the surrenderor or his heir. *Minton* v. *Kirwood*. 449

ENFRANCHISEMENT FINES.

See TENANT FOR LIFE AND REMAINDERMAN.

EQUITABLE MORTGAGEES.

See LANDS CLAUSES ACT, 3.

EQUITY TO SETTLEMENT.

See ELECTION BY WIFE.

ESTATE AND EFFECTS.

A legatee, entitled under a will to such share as testator's widow should appoint, and in default to one-fifth of a moiety, by a deed under the *Bankruptcy Act*, 1861, assigned all his "estate and effects" to trustees for creditors. The widow having subsequently appointed to the legatee the same share he would have taken in default of appointment:—

Held, that the appointed share did not pass under the deed. *In re Vizard's Trusts*. 667

See BANKRUPTCY.

ESTOPPEL.

See CONTRIBUTORY, 3.

EVIDENCE.

See SHARES, BEQUEST OF, 2.

EVIDENCE OF TITLE.

See VENDOR AND PURCHASER, 1, 2.

EXCEPTIONS.

See DOCUMENTS.

EXCESS IN APPOINTMENT.

See POWER.

EXECUTION AGAINST COMPANY.

See WINDING-UP, 2.

EXECUTION OF POWER.

See POWER, TESTAMENTARY.

EXECUTOR.

See COVENANT TO SETTLE FUTURE PROPERTY.

EXECUTORS OF DIRECTOR.

* *See* COMPANIES ACT, 1862.. 2.

EXECUTOR DE SON TORT.

At law an executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative, before action brought.

If an executor *de son tort* hands over part of the property of which he has wrongfully possessed himself to a second person, that person may possibly be sued in equity; but he is not liable as executor *de son tort*.

The rule in equity follows the rule at law; so that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account.

Dictum of Lord *Cottenham* in *Carmichael* v. *Carmichael* (2 Ph. 101), dissented from. *Hill* v. *Curtis*. 90

FENCING.

See TENANT FOR LIFE AND REMAINDERMAN.

FIDUCIARY RELATION.

A., a nephew of a former trustee of *B's* property, being commissioned by his uncle to advise *B.*, a young man aged twenty-three, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to £1000, and to advance him £500 for the purpose, offered to give him £7000 for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years. Pending the negotiations, *A.* obtained from *C.*, a mining engineer, an estimate putting the value of the minerals under the entire estate at £20,000. A separate solicitor was employed for *B.* *A.* did not communicate the valuation to *B.*, nor did he suggest to him that he should consult a mineral surveyor before concluding the matter. *B.* accepted *A's* offer of £7000, and died shortly after executing the conveyance. On bill by *B's* administrator to set aside the purchase:—

Held, that such a fiduciary relation existed that the suppression from *B.* of *C.'s* valuation rendered it impossible for the Court to sustain *A's* purchase. *Tate* v. *Williamson.* 528

FINES ON ENFRANCHISEMENT.

See TENANT FOR LIFE AND REMAINDERMAN.

FORFEITURE.

Testator devised freeholds to *C.* for life, with a clause of forfeiture on bankruptcy. In the testator's lifetime, *C.* was adjudicated a bankrupt, and had not obtained his order of discharge at the testator's death; but no creditors' assignee was ever appointed; and within four months after the testator's death, the bankrupt applied for and obtained an annulment of the bankruptcy. The official assignee had not, during the interval, applied for or obtained possession of the rents, *C.* himself having been in occupation of the estate:—

Held, following the authorities, that the clause must extend to a bankruptcy occurring in the testator's lifetime? but that as the bankrupt, by his diligence, had obtained an annulment of the bankruptcy before any claim made, or property handed or paid over, the forfeiture contemplated by the testator had not occurred. *White* v. *Chitty.* 372

FORFEITURE OF SHARES.

See CONTRIBUTORY, 1, 2.

FOREIGN COURT.

See JURISDICTION, 1.

FOREIGN LAW.

See PORTIONS, DOUBLE.

FRAUD.

See CONTRIBUTORY, 3.
INROLMENT.
TRUSTEE, LIABILITY OF.

FREE SCHOOL.

See GRAMMAR SCHOOL, 1, 2.

FUTURE PROPERTY, COVENANT TO SETTLE.

See COVENANT TO SETTLE FUTURE PROPERTY.
SETTLEMENT.

GENERAL ORDER, 1st FEB., 1861, RULE 1.

See INVESTMENT.

GENERAL SHIP.

See STOPPAGE IN TRANSITU.

GENERAL WORDS.

A marriage settlement recited that by virtue of certain specified instruments, certain specified hereditaments, "and all other the freehold hereditaments in the county of *York* thereinafter expressed to be appointed and released," were limited as the settlor should appoint, and subject thereto, to him in fee. The settlement then recited that, upon the treaty for the marriage it was agreed that the several hereditaments and estates in the county of *York* "thereinafter mentioned and intended to be thereby conveyed" should be assured to the uses thereinafter mentioned. The deed then contained an appointment and conveyance by the settlor of the specified hereditaments mentioned in the recital, and of "all other the freehold hereditaments, if any, in the county of *York*, of or to which the grantor was seised or entitled for an estate of inheritance."

The settlor, at the date of the conveyance, was seised of a fee simple estate in *Yorkshire*, called the *L.* estate, which was not comprised in the above specified instruments, and was not recited nor mentioned in the conveyance:—

Held, that the general words must be restricted by the recital, and that the *L.* estate did not pass. *Jenner* v. *Jenner*. 361

See CONDITIONS OF SALE.

GIFT OVER.

See IMPLICATION, ESTATE BY.

GIFT TO SEVERAL OR SUCH AS SURVIVE *A.*

Gift by will of a sum of stock to *A.* for life, remainder to any wife he might thereafter marry, for life or widowhood, remainder to the children of *A.* absolutely; and in case *A.* should die *unmarried and without issue*, then, from and after his decease, to *B.*, *C.*, and *D.*, share and share alike, or to such of them as should be living at *A.'s* death, his, her, or their executors, administrators, and assigns absolutely.

A. survived *B.*, *C.*, and *D.*, and died a widower, without ever having had a child:—

Held, that upon the death of *A.* the representatives of *B.*, *C.*, and *D.* took the legacy in equal shares.

The Court declined to read the word "and" as "or;" but treating the word "unmarried" as a word of flexible meaning, decided that it here meant "without leaving a widow," in order to give expression to the whole clause.

The doctrine of *Sturgess* v. *Pearson* (4 Madd. 411), was held to apply to the interests of *B.*, *C.*, and *D.*, although contingent, following *Wagstaff* v. *Crosby* (2 Coll. 746). *Willis* v. *Plaskett* (4 Beav. 208) disapproved.

The word issue was held to mean issue before described. *In re Sanders' Trusts*. 675

GRAMMAR SCHOOL.

1. A school having been founded by letters patent in the town of *B.*, and afterwards incorporated by statute, for "the teaching of children in grammar freely, without any exaction or request of money, not exceeding the number of 144":—

Held, that instruction in Latin and Greek was made imperative by the terms of the foundation.

The average number of scholars presenting themselves from the town of *B.* and its neighbourhood having never exceeded 50, the Court refused to adopt a proposal for increasing the number of scholars by throwing the school open to the whole world, and establishing dames' houses in the town, and sanctioned a scheme for enlarging the school by allowing the head master to take boarders.

An offer of a grant of money to an endowed school, accompanied by conditions that exhibitions to the university of like amount to the interest of

the grant should be maintained out of the school revenues, and the capital of the grant applied in restoration and enlargement of the masters' houses, was accepted by the Court.

A scheme having been settled in 1857, providing that £5 a year should be paid to the masters for each foundation boy out of the school revenues, so far as they would extend, and when they failed, then by the parents of such foundation boy; and that £9 a year should be paid by the parents of each boy not on the foundation;

The Court varied the scheme by directing that a fee of £3 3*s.* a year should be paid for each foundation boy, to the number of 50, out of the school revenues, and that 144 foundation scholars should be elected, with preference to town boys, for whom capitation fees were to be paid out of the revenues of the school, so far as the income would extend, but that no town boy should pay more than £3 3*s.* as a capitation fee. *Berkhampstead School Case.* 102

2. Upon evidence of the decrease in value, during the last thirty years, of the property of the Free Grammar School, founded at *Manchester* in the reign of *Henry* VIII., and of the impossibility, for want of funds, of fully carrying out the extended system of gratuitous education, including instruction in modern languages and the physical sciences, which was sanctioned by a scheme settled in 1849, the Court, having regard to the manifest intention of the founder not to make it a school for the poor only, but to establish a liberal system of education, so as to fit boys for the university, allowed the admission of boys, beyond the existing number of free scholars, on payment of capitation fees, which should be applied in increasing the educational funds, and not paid to the masters directly.

To obviate any invidious separation of the boys into two classes of rich, or paying, and poor, or non-paying, the Court at the same time directed that, for the future, admission to a gratuitous education upon the foundation should depend upon proficiency in examination, without reference to the means of the parents. *Manchester School Case.* 55

GRATUITOUS EDUCATION.

See GRAMMAR SCHOOL, 1, 2.

GRAVEL, SALE OF.

See TENANT FOR LIFE AND REMAINDERMAN.

HOLDING OVER.

Where a testator had improperly received the rents and profits of an estate for several years after the death of his wife, who was tenant for life, and before the remainderman asserted his right to possession:—

Held, on demurrer, that the remainderman was entitled to maintain a bill against the legal personal representative for an account of the rents and profits improperly received by the testator, and, if the Defendant did not admit assets, for an account of the testator's estate. *Caton* v. *Coles.* 581

HUSBAND AND WIFE.

A settlement may be made of a legacy to which a married woman becomes entitled during coverture, so as to give her husband a life interest determinable on bankruptcy or alienation. *Montefiore* v. *Behrens.* 171

See COVENANT TO SETTLE FUTURE PROPERTY.
ELECTION BY WIFE.
JUDICIAL SEPARATION.
SETTLEMENT.

IMMORAL PURPOSE.

A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease

absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee which was being administered:—

Held, that the assignment, and every thing arising out of it, was so tainted with the immoral purpose, that the Plaintiff could not recover. *Smith* v. *White*. 626

IMPLICATION, ESTATE BY.

Gift of personalty, by will after the death of *J.* (to whom an annuity was given out of the fund), to *E.* during her natural life, but in case of the death of *E.* during the lifetime of *J.*, then to *M.* for life: and after the decease of both *E* and *M.*, then over:—

Held, that there was sufficient indication of the testator's intention to give a life estate to *M.* after the death of *E.*, although *E.* did not die in the lifetime of *J.* *In Re Betty Smith's Trusts*. 79

IMPLICATION, GIFT BY.

The testator having five sons, gave an annuity to one (*Henry*, a lunatic), and at his (testator's) death a legacy "to each of my sons," naming only the other four, and directed his executors to invest his residuary personal estate in stock; "the interest therefrom to be divided half-yearly between my four sons above-named, and at the decease of either without lawful issue such share to revert to the remainder then living, their child or children:"—

Held, first, that the four sons only (excluding *Henry*) were entitled; and, secondly, that they took only for life, with an estate, by implication, to their issue living at their death, as joint tenants.

Ex parte Rogers (Registrars' Book A, 1815, page 849) considered. *Dowling* v. *Dowling*. 442

INCOME.

See Partnership.
Tenant for Life and Remainderman.

INCREASING INJURY.

See Nuisance 2.

INDEMNITY.

See Lost Policy.

INDORSEMENT "IN NEED."

See Bill of Exchange.

INFANT.

The father, a beneficed clergyman of the Church of *England*, having appointed a minister of the same church, conjointly with his widow, guardians of his children, the widow, after her husband's death, attached herself to the *Plymouth Brethren*, and with the infants frequented their meeting-house. The Court, on the application of the other guardian, ordered the children to be educated in the principles of the Church of *England*, and restrained their attendance at the meeting-house of the dissenting body.

In directing the religious education of its wards the Court will have regard to the religious views of the father where they are not immoral or dangerous. *In re Newbery*. 431

INJUNCTION.

See Agent.
Arbitration.
Copyright.
Damages, 3.
Nuisance, 1, 2.
Patent, 3.
Sequestration.

INJURY, SUBSTANTIAL.

See BUILDING, COVENANT AGAINST.

INLAND REVENUE OFFICE CERTIFICATE.

See SUCCESSION DUTY ACT.

INROLMENT.

The rule of practice that a decree must be enrolled before it can be pleaded in bar of a second suit for the same matter was laid down only with reference to the case of bill and cross bill and is not applicable to a case where the bill is filed to impeach a decree on the ground of fraud.

Kinsey v. *Kinsey* (2 Ves. Sen. 577) considered. *Pearse* v. *Dobinson.* 241

INSOLVENCY.

See ELECTION BY WIFE.
JURISDICTION, 1.

INSURANCE.

See LOST POLICY.

INSURANCE OFFICE.

See ORDER AND DISPOSITION.

INTEREST.

See PARTNERSHIP, 2.

INTEREST ON LEGACY.

See MAINTENANCE.

INTEREST, SUIT FOR.

See STATUTE OF LIMITATIONS, 2.

INTERROGATORY.

See DOCUMENTS.

INTERROGATORIES.

See DISMISSAL FOR WANT OF PROSECUTION.

ISSUE.

See COVENANT TO SETTLE FUTURE PROPERTY.
GIFT TO SEVERAL OR SUCH AS SURVIVE *A.*

ISSUE, DEFAULT OF.

See IMPLICATION, GIFT BY.

ISSUE, ESTATE IMPLIED IN.

See IMPLICATION, GIFT BY.

INVALID TRUST.

See TRUSTEES' COSTS.

INVESTMENT.

The Court may, under 23 & 24 Vict. c. 38, s. 10, and the General Order of the 1st of February, 1861, rule 1, order the investment in Consols of money paid into Court under a private Act, although such private Act directs the investment to be in Exchequer Bills. *In re Birmingham Blue Coat School.* 632

JOINT STOCK COMPANIES ACT, 1856, s. 41.

See COMPANIES ACT, 1862 .. 3.

JUDICIAL SEPARATION.

Where a married woman entitled to a reversionary interest in personalty has joined with her husband in mortgaging such interest, and has afterwards obtained a decree of judicial separation, and is living apart from her husband,—on the property coming into possession, she is entitled to it absolutely under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8. *In re Insole.* 470

JURISDICTION.

1. The Plaintiff a native of one of the colonies, alleged that he had taken the benefit of a Colonial Insolvent Act, in consequence of having had a judgment

recovered against him in the Colonial Court, from which judgment he had appealed, but unsuccessfully; that the assignee, now in *England*, had assets in his hands, out of which, if the judgment were reversed, a large surplus would be coming to him; that the judgment was the result of an erroneous decision, and an appeal would probably be successful, but that the assignee, colluding with the judgment creditor, refused to prosecute such appeal; and prayed that the assignee might be decreed to prosecute the appeal, or that the Court would enable the Plaintiff to prosecute the appeal in the name of the assignee:—

Held, that there was no sufficient averment that the Plaintiff had failed to obtain justice in the ordinary tribunals of his own country to empower the court to interfere; and demurrer allowed. *Smith* v. *Moffatt.* 397

2. On bill filed, praying a declaration that a legal estate did not pass by a settlement, or if it did, that the settlement might be rectified; and the Court being of opinion that the estate did not pass:—

Semble, that the Court had no jurisdiction to declare the legal right, and,

Held, that the proper decree was, "The Court being of opinion that the estate did not pass, dismiss the bill without costs." *Jenner* v. *Jenner.* 361

See ARBITRATION.
DAMAGES, 1, 2, 3.
HOLDING OVER.

LACHES.

See PATENT, 3.

LANDS CLAUSES ACT.

SECTION 74.

1. A railway company took land subject to a building lease, which had been granted in consideration of an outlay in building, at less than rack-rent, and of which eleven years were unexpired, and paid the compensation money for the reversion, subject to such lease, into Court, under the *Lands Clauses Consolidation Act*:—

Held, upon Petition by tenant for life of the land for payment of the dividends of the fund in Court to her, that so much of the dividends should be paid to the tenant for life as would compensate her for loss of rent sustained by the company having taken the land, and that the remainder of the dividends should be accumulated till the end of the lease, so that there might then be in Court a sum representing the value of the whole fee. *In re Wootton's Estate.* 589

SECTION 80.

2. Where land belonging to trustees of a charity had been taken by a railway company under an Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, and the purchase-money paid into Court, and the Court, by a former order, had directed the trustees to apply the money so paid, or to be paid, for the purpose of improving the supply of water to the town where the charity property was situated:—

Held, that the costs of an application by the trustees for payment to them of the fund in Court to be applied for that purpose, must be borne by the company under s. 80 of the said Act. *In re Lathropp's Charity.* 467

SECTIONS 85, 87, 108, 110.

3. A railway company, with full notice of an equitable mortgage, instead of proceeding under the mortgage clauses of the *Lands Clauses Act*, served the notices only on the mortgagors, made a deposit, executed bonds to the mortgagors and mortgagees, under the 85th section, and subsequently summoned a jury, who assessed the compensation. The mortgagees were not parties to the inquiry, though they were aware that it was pending:—

Held, that the mortgagees were not bound by the proceedings.

On a bill by the equitable mortgagees the Court declined to direct a

fresh valuation, but under the 87th section of the *Lands Clauses Act* applied the fund, which the Lords Justices had ordered to be treated as a deposit under the 85th section, in satisfaction of the mortgage. *Martin* v. *London, Chatham, and Dover Railway Company.* 145

See Costs, 1.

LAST WILL.

See Power, Testamentary.

"LAWFULLY BEGOTTEN" CONSTRUCTION OF.

See Legitimacy.

LEASE.

See Bankruptcy.
Covenant against Particular Trade.
Usual Covenant.

LEASE, BUILDING.

See Lands Clauses Act, 1.

LEASE OF WHOLE PROPERTY OF COMPANY.

See Ultra Vires.

LEASE, OPTION TO TAKE.

See Option.

LEASE TO COMPANY.

See Winding-up, 1.

LEASES.

See Best Rent.
Settled Estate.

LEGACY DUTY.

See Succession Duty Act.

LEGACY, INTEREST ON.

See Maintenance.

LEGACY SPECIFIC.

See Revocation by Codicil.

LEGATEE.

See Marshalling.

LEGATEES.

See Costs, 2.

LEGATEES, COSTS OF.

See Costs, 2.

LEGITIMACY.

A testator in *England* gave and devised real and personal estate, situate in *England*, to his great-niece for life, with remainder, as to the personalty, to her children, and as to the realty, to her first and other sons lawfully begotten, with remainders over. The great-niece, in 1830, married in *England*, but never lived with her husband, and a decree of divorce *à vinculo*, on the ground of the husband's adultery, was pronounced by the Court of Session in *Scotland*, the husband having been induced, with the wife's connivance, to go to *Scotland* to bring himself within the jurisdiction of the Scotch Courts. The great-niece, in 1846, married in *Scotland* an Englishman domiciled there, and had by him two daughters and a son, all born in *Scotland* during her first husband's lifetime. Upon Petition by these three children, claiming as children, the son claiming also as eldest son lawfully begotten, two funds representing portions of the testator's real and personal estate, which had been paid into Court:—

Held, that the English marriage being indissoluble, the decree of divorce pronounced by the Court of Session must be treated as a nullity; that the second marriage in *Scotland* was invalid, and therefore that the children, whatever might be their *status* in *Scotland*, must in *England* be treated as illegitimate; and could not, upon the construction of an English will by an English Court, be held to come within the term "children" or

"eldest son lawfully begotten," as used in such will, and were not entitled to the funds in Court. *In re Wilson's Trusts.* 247

LESSOR OF COMPANY, CLAIM BY.

See WINDING-UP, 1.

LIABILITY.

See TRUSTEE, LIABILITY OF.

LIEN.

See DEPOSIT, RETURN OF.
SALE OF RAILWAY.

LIEN, VENDOR'S.

See VENDOR'S LIEN.

LIFE ESTATE, IMPLIED.

See IMPLICATION, ESTATE BY.

LIFE INTEREST.

IMPLICATION, GIFT BY.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS, 1, 2.

LOST POLICY.

An insurance company paying under a decree of the Court the money payable under a lost policy are sufficiently indemnified by the decree, and are not entitled to any indemnity from the persons to whom the money is paid. *England* v. *Lord Tredegar.* 344

MAINTENANCE.

Testator bequeathed to his infant son a legacy of £6000, contingently on his attaining twenty-one. He also bequeathed his residuary real and personal estate on trust till his said son should attain, or if living would have attained, fifteen, for the maintenance and education of all his children, and subject thereto for accumulation at compound interest; the aggregate fund to be in trust for all his children contingently on their attaining twenty-one:—

Held, on the authority of *Chambers* v. *Goldwin* (11 Ves. 1), that the infant was entitled to maintenance during the interval between his attaining fifteen and twenty one; and, the Court selecting that mode of giving maintenance which was most for the benefit of the infant, interest was declared to be payable on the £6000 legacy. *Martin* v. *Martin.* 369

MAJORITY, POWER OF.

See ULTRA VIRES.

MANAGEMENT BY TRUSTEES.

See TENANT FOR LIFE AND REMAINDERMAN.

MARSHALLING.

Pecuniary legatees are entitled to stand in the place of the vendor against an estate purchased and devised by the testator, the purchase-money for which is paid after the testator's death out of his personal estate.

Wythe v. *Henniker* (2 My. & K. 635) not followed. *Lord Lilford* v. *Powys Keck.* 347

MESNE PROFITS.

See HOLDING OVER.

MISREPRESENTATION.

See REGISTER, RECTIFICATION OF.

MISTAKE IN ANSWER.

See SUPPLEMENTAL ANSWER.

MONUMENT IN CHURCH.

See CHARITY.

MORTGAGE.

See JUDICIAL SEPARATION.

MORTGAGEE.

See STATUTE OF LIMITATIONS, 2.
TITLE DEEDS.

MORTGAGEE IN POSSESSION.

See STATUTE OF LIMITATIONS, 1.

MORTGAGEES.

See LANDS CLAUSES ACT, 3.

MORTGAGOR AND MORTGAGEE.

See PRODUCTION, 3.

MORTMAIN ACT.

A grant of lands for charitable purposes does not comply with the provisions of the *Statute of Mortmain* unless the grantor grant, *bonâ fide*, all the interest he has in the property to be conveyed, whether from rents to be received, or from actual possession at the time of the grant.

Therefore, where a man advanced in life, by a deed duly executed, attested, and enrolled, made a grant of real estate, including his dwelling-house, to trustees for charitable purposes, subject to a lease made shortly before the grant, at a peppercorn rent for twenty years, determinable on the death of the grantor and his sister, to his said sister, with whom he there resided and continued to reside, and who was acting in concert with him in the matter:—

Held, that the grant was void.

A deed, attested by one witness, though executed and acknowledged for the purpose of inrolment, in the presence of two persons who are parties to and execute the deed, but do not sign the attestation clause, is not a deed *sealed and delivered in the presence of two or more credible witnesses* within the meaning of the *Statute of Mortmain*.

A deed, so attested, executed by the grantor's sister and heiress-at-law after his decease, and purporting to confirm the grant:—

Held, invalid. *Wickham* v. *Marquis of Bath*. 17

NAME.

See TRADE MARK.

NEXT OF KIN.

Persons claiming property as next of kin to a deceased intestate, and shewing their kindred, are entitled, in the absence of evidence that a person now dead and nearer of kin to the intestate survived him. The onus rests on those claiming through a deceased nearer of kin to the intestate, to shew that such deceased survived the intestate. *In re Green's Settlement*. 288

NO BIDDING, CERTIFICATE OF.

See OPENING BIDDINGS.

NOTICE.

See COVENANT AGAINST PARTICULAR TRADE.
ORDER AND DISPOSITION.
REGISTER, RECTIFICATION OF.
WINDING-UP, 3.

NOTICE OF DISCHARGE.

See WINDING-UP, 4.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE.

NUISANCE.

1. In an order for an injunction to restrain Defendants from polluting a stream, it is proper to insert the words "to the injury of the Plaintiff," in order to establish a ground for the interference of the Court, and to pre-

vent its authority being invoked for trivial purposes.

The order was finally drawn up in the following form:

"This Court doth order that a perpetual injunction be awarded against the Defendants, the *Stowmarket Company*, to restrain the said Defendants, their servants, agents, and workmen, from discharging from their works in the Plaintiff's bill mentioned, into the river or stream in the said bill also mentioned, so as to cause it to flow to the Plaintiff's land, messuage, and mills, therein also mentioned, in a state less pure than that in which it flowed there previously to the establishment of the said works, to the injury of the Plaintiff, any such refuse or other matter as was discharged by the Defendants from the same works into the said river or stream previously to the filing of the said bill, or any noxious fluids or other foul matters whatsoever." *Lingwood* v. *Stowmarket Company*. 77, 336

2. Injunction granted to restrain commissioners for draining a town from causing the sewage to be discharged into a stream passing through the Plaintiff's land, and feeding a lake therein situated, when the sewage injuriously affected the water of the stream and lake, and had done so for some years, and the pollution of the water perceptibly increased as new houses contributed their sewage to the stream.

Semble—In such a case no prescriptive right could be claimed by the commissioners to discharge the sewage through the stream. *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*. 161

See SEQUESTRATION.

NUMBERS.

See TRADE MARK.

OBJECTIONS, PARTICULARS OF.

See PATENT, 1, 2, 4.

ONUS PROBANDI.

See DAMAGE, MEASURE OF.
NEXT OF KIN.

OPENING BIDDINGS.

The usual order to open biddings which provides that, in case there shall be no higher bidding, the person offering the advance is to be allowed purchaser, followed by a certificate of no bidding and of such allowance, is not final, and does not preclude the Court from re-opening the biddings. *Ewing* v. *Waite*. 440

OPTION.

Under an agreement to let a house for three years at a yearly rent, by which the landlord agreed, at the request of the tenant, to grant him a lease for a term from the expiration of the three years' occupancy, at the same rent, the tenant undertaking to keep the house in repair:—

Held, that the tenant was entitled, four years after the expiration of the three years' occupancy, to have the agreement for a lease specifically performed, and that neither an application made by him two years previously for a lease at a reduced rent (which was refused), nor an application to the landlord for payment of an amount expended in repairs (which had been allowed to the tenant), amounted to a waiver of his rights, though the Plaintiff was bound to refund the cost of the repairs. *Moss* v. *Barton*. 474

OPTION TO TAKE LEASE.

See BANKRUPTCY.

ORDER 11 NOV., 1862, Rule 2.

See WINDING-UP, 3.

ORDER AND DISPOSITION.

Bankers with whom policies of insurance were deposited by the insured as security gave no notice in writing to the offices, though the secretaries were casually made aware of the fact of the deposit. The assured became bankrupt and died. On bill by the assignees,

Held, that the policies remained in the bankrupt's order and disposition, and that his assignees were entitled to the proceeds, less the premiums paid by the bankers. *Edwards* v. *Martin*. 121

ORDER OF COURSE.

See Depositions in Bankruptcy.

ORDER IN NUISANCE CASE.

See Nuisance, 1.

"OUTGOINGS."

On a sale of leaseholds, the conditions were that the purchaser should have possession on the 14th November, 1864, "all outgoings up to that day being cleared by the vendors":—

Held, on a bill by the vendors for specific performance, that an apportioned part of the current rent, from the last quarter day to the 14th November, was an outgoing, and must be allowed to the purchaser. *Lawes* v. *Gibson*. 135

PAID-UP SHARES.

See Contributory, 3.

PARISH.

See Way, Dedication of.

PAROL EVIDENCE.

See Shares, Bequest of, 2.

PARTICULARS OF OBJECTIONS.

See Patent, 1, 2, 4.

PARTIES.

See Building, Covenant against.
Champerty.
Covenant against Particular Trade,
Production, 2.
Vendor's Lien.

PARTNERSHIP.

1. Partnership articles provided that no partner should sell his shares except as follows:—That the partner desirous of selling should offer the shares to his co-partners collectively; if they should decline, then to the partners desirous of collectively purchasing; and if none such, then to the partners individually; after which he might sell to a stranger.

One of four partners offered his shares to the other three collectively (one of whom to his knowledge would not purchase). The remaining two declared their willingness to accept, and were told that no offer was made to them:—

Held, that the offer to the three enured for the benefit of the two, and specific performance decreed accordingly. *Homfray* v. *Fothergill*. 567

2. Partnership articles provided that the partnership should continue for five years notwithstanding the death of any partner before the expiration of the term, that the profits should be divided annually, and that before any division of profits each partner should, at the end of each year, be credited with interest at five per cent. on his capital in the business at the beginning of the year. One of the partners died before the expiration of the five years:—

Held, that the whole of the share of the deceased partner of the profits divided at the annual division next after his death was income of his estate, but that the interest on his share of capital was apportionable, and so much of such interest as accrued in his lifetime was *corpus*, and the remainder income of his estate. *Ibbotson* v. *Elam*. 188

PATENT.

1. Particulars of objections filed by a Defendant were ordered to be amended by the insertion of words specifying "the persons by whom, the places where, the dates at, and the manner in which," there had been the alleged user prior to the date of the Plaintiff's patent.

In complying with this order, the Defendant was permitted, in his amended particulars, to preface his statement of the specific instances of alleged prior user with the words "amongst other instances," in order to give him an opportunity of applying for leave to re-amend by inserting any further instances of prior user which he might discover.

Upon an application by Defendant for leave to re-amend objections by inserting certain further specified instances which had come to his knowledge, he was ordered to pay the costs of the application, and the costs arising out of and consequent upon the re-amendment were reserved. *Penn* v. *Bibby*. 548

2. In a suit to establish the validity of a patent, where the patent is impeached on the ground of want of novelty and prior user of the invention, the Defendant will not be allowed, in the course of the hearing before the Court without a jury, to introduce evidence of prior user not disclosed by the particulars of objection, although such evidence may have only come to his knowledge since the delivery of the particulars of objection.

Semble, that the Court will give the Defendant leave, on short notice of motion, to amend his particulars of objection, so as to introduce such newly-discovered evidence. *Daw* v. *Eley*. 38

3. Where an interlocutory injunction to restrain infringement of a patent was moved for in a suit in which the bill was filed in July, and it appeared that the Plaintiff wrote complaining of the infringement in the preceding November, and knew of the Defendant's proceedings in the previous August, the injunction was refused on the ground of delay.

Observations on the course to be pursued by a patentee seeking a remedy against numerous persons who are all alleged to be infringing the patent at the same time. *Bovill* v. *Crate*. 388

4. In a suit to restrain the infringement of a patent, the Defendant will not be required to deliver particulars of his objections to the patent where replication has been filed and the Court has refused to direct issues. *Bovill* v. *Goodier*. 35

See DAMAGES, 2.

PATENT LAW AMENDMENT ACT.

See PATENT, 1, 2.

PAYMENT OUT OF COURT.

Fund in Court exceeding 600*l.* paid out to tenant in tail without a disentailing deed having been executed. *Notley* v. *Palmer*. 241

PEER.

See PROMOTERS, CONTRACT BY.

PERIOD OF DISTRIBUTION.

See DISTRIBUTION, PERIOD OF.

PERPETUITY.

See VESTING, TIME OF.

PERSONAL REPRESENTATIVE.

See COVENANT TO SETTLE FUTURE PROPERTY.

PERSONAL SERVICE.

See AGENT.

PETITION.

See WINDING-UP, 3.

PETITION TO ENFORCE VENDOR'S LIEN.

See VENDOR'S LIEN.

PLEA OF FORMER DECREE.

See INROLMENT.

PLEADING.

It is irregular to demur alone to part

of a bill when interrogatories have not been filed and the time for filing them has not expired.

Whether, under the like circumstances, it is irregular to demur to part of the bill and put in a voluntary answer to the rest—*Quære.* *Rowe* v. *Tonkin.* 9

See DEPOSIT, RETURN OF.

PLYMOUTH BRETHREN.

See INFANT.

POLICY.

See LOST POLICY.
ORDER AND DISPOSITION.

PORTIONS, DOUBLE,

By a settlement made in the Scotch form upon the marriage of his daughter with a domiciled Scotchman, *A.*, a domiciled Englishman, covenanted to pay the trustees 4000*l.* as a provision for the benefit of his daughter and her husband and the younger children of the marriage. The 4000*l.* was not paid by *A.* during his lifetime; but by his will made after the death of his daughter, *A.* gave 16,000*l.* between the younger children of the marriage:—

Held, that the will being an English disposition, the English doctrine of presumption against double portions was applicable, and that the provisions made by the testator's will in favour of his grandchildren operated as a satisfaction of the provisions made for them by the settlement. *Campbell* v. *Campbell.* 383

POWER.

By a marriage settlement a fund was limited, after the death of the survivor of husband and wife, to "all and every the children, or child, or more remote issue" of the marriage, as the wife should by deed or will appoint. By will, the wife appointed the fund to three new trustees upon trust to pay the income to her son (the only child of the marriage), for his life, or until he should become bankrupt, or should assign or incumber the same, and then to the trustees for his life, "for the benefit of her son, his wife and children, or any of them, as the trustees should think expedient." The son attained twenty-one, and assigned the share:—

Held, although the excessive appointment was discretionary only, that the appointment was void *in toto*, and not merely for the excess. *In re Brown's Trust.* 74

POWER OF SALE.

A settlement of personalty upon the usual trusts contained a power for the trustees to sell the trust funds, and invest in the purchase of real estate, to be held upon such trusts as would best correspond with the subsisting trusts, and that such real estate should be considered as personal estate for the purposes of the settlement. There was no express power of sale over the real estate so purchased:—

Held, that the trustees had a power of sale over purchased real estate. *Tait* v. *Lathbury.* 174

POWER, REFERENCE TO.

A testatrix having a life interest in a sum of Consols, with a power of appointing the same among her children, who were to share equally in default of appointment, by her will made in 1864, which contained no reference to the power, bequeathed all money belonging to her in Consols, and all the money that she might die possessed of, to her two surviving children (two having previously died), and to a stranger to the power, in equal shares. The testatrix possessed no Consols or other stock other than that subject to the power:—

Held, that the will was a valid exercise of the power as to the two-thirds bequeathed to the surviving children, and that the remaining third went to those entitled in default of appointment. *In re Gratwick's Trusts.* 177

POWER, TESTAMENTARY.

B., by a will made in 1858, specifically devised and bequeathed freehold, copyhold, and leasehold property, and gave all other real and personal estate, of which he should die possessed or should have power to dispose, upon certain trusts. By a voluntary settlement in August, 1862, *B.* conveyed all his freehold property upon trust, after his own death, for *E.* for life with remainder as *B.* should "by his last will or any codicil thereto," appoint, and in default of appointment in trust for *E.* in fee, and by the same settlement he disposed of all his leasehold and personal property. In November, 1862, *B.*, by an instrument purporting to be his last will, and not mentioning any former will, appointed under the power in the settlement an annuity to be raised out of his freehold property, and devised all his copyhold property; but made no other disposition of freehold or personal property. Probate of both wills was granted:—

Held, that having regard to the terms of the power the testator had indicated an intention that the will of 1862 alone should operate as an execution of the power, and that consequently the specific and residuary devises in the will of 1858 were not a due execution of the power. *Pettinger* v. *Ambler; Bunn* v. *Pettinger*. 510

PRACTICE.

See Appeal.
Costs, 4.
Costs of Purchaser.
Damages, 1.
Depositions in Bankruptcy.
Dismissal for want of Prosecution.
Documents.
Inrolment.
Nuisance, 1.
Patent, 1, 2.
Production, 1, 2.
Substituted Service.
Supplemental Answer.
Vendor's Lien.
Vendor and Purchaser, 1.

PRE-EMPTION.

See Partnership, 1.

PRESCRIPTIVE RIGHT.

See Nuisance, 2.

PRESENTATION.

See Bill of Exchange.

PRESUMPTION.

See Next of Kin.
Portions, Double.
Way, Dedication of.

PRODUCTION.

1. An application for liberty to seal up or not to deposit documents, possession of which is admitted by the affidavit of a Defendant who has not been required to answer as to documents, need not be made on the original summons for production, but will be granted on summons by such Defendant, after he has filed his affidavit, without his being required to pay the cost of his summons. *Talbot* v. *Marshfield*. 6

2. In an administration suit an order was made, on the application of the Defendants, the trustees of the will, that a contract made by them before the institution of the suit for the sale of part of the testator's estate should be carried into effect, the purchaser consenting to be bound by the order, "as if he were a party to the suit, and the contract were specially the subject thereof." The purchaser having made an application, which was opposed by the trustees, for the reduction of the purchase money on the ground of adverse claims to part of the property:—

Held, that he was entitled to an affidavit by the trustees as to documents in their possession relating to the matters in question between him and them. *Dent* v. *Dent*. 186

3. A mortgagee is always bound to produce the mortgage deed for the inspection of the mortgagor.

Semble,—Where a solicitor employed professionally by mortgagor and mortgagee subsequently takes a transfer of the mortgage and forecloses; in a suit by a mortgagor to open the foreclosure decree, the solicitor is bound to produce all documents, &c., prepared by him as such solicitor. *Patch* v. *Ward*. 436

See TITLE DEEDS.

PROFITS.

See PARTNERSHIP, 2.

PROMOTERS, CONTRACT BY.

The promoters of a railway company contracted with a landowner, being a peer of Parliament, to pay him £20,000 personally, for his countenance and support in obtaining their Act, such sum to be independent of the ordinary payment for land, severance, and other usual compensation. After the passing of the Act the directors of the company, when formed, ratified the contract, but having doubts whether, under the *Lands Clauses Act*, the landowner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be retained by the company or paid into Court. A separate agreement stipulated for the quantity of land to be taken for the railway, and the amount to be paid by the company:—

Held, that the original contract and the contract by the directors after the formation of the company to pay a sum of money for countenance and support previously given in procuring the Act, were *ultra vires* of the company, and could not be enforced against the company as payment of expenses of obtaining the Act, under the 65th section of the *Companies Clauses Act*, or otherwise.

The doctrine laid down by Lord *Cottenham*, that a company after formation is bound by the contracts of its promoters, disapproved of; and so far as it applies to any thing to be done which is *ultra vires* of the company, must be considered as overruled. *Earl of Shrewsbury* v. *North Staffordshire Railway Company*. 593

PROSPECTUS.

See DEPOSIT, RETURN OF.
REGISTER, RECTIFICATION OF.

PROTECTION, TIME TO CLAIM.

See PRODUCTION, 1.

PURCHASE, SETTING ASIDE.

See FIDUCIARY RELATION.

PURCHASER.

See PRODUCTION, 2.
SUCCESSION DUTY ACT.

PURCHASER FOR VALUE.

A purchaser for value of an interest in land cannot require a voluntary deed or agreement affecting the estate to be delivered up to him to be cancelled. *De Hoghton* v. *Money*. 154

RAILWAY COMPANY.

See COSTS, 1.
LANDS CLAUSES ACT, 2, 3.
PROMOTERS, CONTRACT BY.

RAILWAY, SALE OF.

See SALE OF RAILWAY.

RATIFICATION BY HEIR.

See CONVERSION.

RECEIVER'S ACCOUNTS.

See COSTS, 3.

RECITAL.

See GENERAL WORDS.
SETTLEMENT.

REFERENCE TO POWER.

See POWER, REFERENCE TO.

REGISTER, RECTIFICATION OF.

A person who would otherwise be entitled to set aside a contract on the ground of fraud, cannot do so if, after discovering the fraud, he has acted in a manner inconsistent with the repudiation of the contract.

Where therefore, a person was induced to take shares in a company on the faith of representations contained in the prospectus, which he afterwards discovered to be false, and subsequently to the discovery instructed his broker to sell the shares:—

Held, that his name could not be removed from the register.

Semble, if a prospectus of a company states that the articles of association may be seen at a certain place, a person taking shares on the faith of the prospectus, and without inspecting the articles, must be held to do so with notice of the contents of such articles, provided they do not contain anything incompatible with the prospectus. *Ex parte Briggs. In re Hop and Malt Exchange and Warehouse Company.* 483

RELEASE.

A voluntary declaration by a creditor that he intends to release his debtor from a debt, though not amounting to a release at law, may nevertheless be held in equity to be a representation which the creditor is bound to make good.

Where, therefore, a mortgagee, on hearing that his son-in-law, the mortgagor, was about to sell the mortgaged property (a house occupied by the mortgagor) in order to pay off the debt, wrote that he might continue to live there without paying any rent, it was held that the mortgagor was entitled to redeem, on paying the principal, together with interest from the last day on which interest fell due, previously to the death of the mortgagor. *Cross* v. *Sprigg* (Cowp. 9) commented on. *Yeomans* v. *Williams.* 184

RELIGIOUS EDUCATION.

See INFANT.

REMOTENESS.

See VESTING, TIME OF.

RENT, CURRENT.

See OUTGOINGS.

REPRESENTATION.

See RELEASE.

REPUTED OWNERSHIP.

See ORDER AND DISPOSITION.

REQUISITION, WAIVER OF.

See RESCIND, RIGHT TO.

RESCIND, RIGHT TO.

A clause authorizing the vendor to rescind the contract for sale in case the purchaser should insist on any requisition which the vendor should be unable or unwilling to comply with:—

Held, not to justify a notice to rescind where the purchaser, after finding that the vendor was unable or unwilling, waived the requisition. *Duddell* v. *Simpson.* 578

RESERVATION TO GRANTOR.

See MORTMAIN ACT.

RES JUDICATA.

See INROLMENT.

REVOCATION BY CODICIL.

A testatrix, by her will, gave to *A.* for life the interest of 300*l.*, or thereabouts, invested by her in the *General*

Steam Navigation Company, and the interest of 200*l.*; and after *A.'s* death she gave the "said principal sum of 500*l.*" to *A.'s* children; and she directed that, in case of her personal estate proving insufficient for the payment of her legacies, such deficiency should be made up out of her real estate, by sale or mortgage. By a codicil she gave "all her personal estate" to *B.*:—

Held, that the whole personal estate passed by the codicil; that the legacy of 300*l.* was specific, and was revoked by the codicil; and that the legacy of 200*l.* was not revoked, but remained charged on the real estate. *Kermode* v. *Macdonald.* 457

See CONVERSION.

ROLT'S ACT (25 & 26 Vict. c. 42).

See JURISDICTION.

SALE BY COURT.

See COSTS OF PURCHASER.
OPENING BIDDINGS.

SALE OF RAILWAY.

The owner of land, of which a railway company has taken possession, either under the 85th section of the *Lands Clauses Consolidation Act*, or by agreement, has a lien on the land for the purchase money, and also for the money payable to him as compensation for damage by severance and injury to his adjoining land, unless such compensation is the subject of a separate agreement between him and the company. He is not deprived of such lien by a deposit and bond under the 85th section, or by accepting a deposit in the names of trustees in lieu of the statutory deposit, if the purchase and compensation moneys exceed the deposited sum.

The Court of Chancery will enforce the lien by sale, although the railway has been made over the land, and opened for public use. *Walker* v. *Ware, Hadham and Buntingford Railway Company.* 195

SALES.

See BEST RENT.
SETTLED ESTATE.

SATISFACTION.

See PORTIONS, DOUBLE.

SCHEME.

See GRAMMAR SCHOOL, 1, 2.

SCOTCH DIVORCE.

See LEGITIMACY.

SEALING OF DOCUMENTS.

See PRODUCTION, 1.

SECRET BARGAIN.

See COMPOSITION.

SEPARATE USE.

1. Bequest by will of the residue of testator's personal estate to testator's niece (then a widow), "for her own sole use and benefit absolutely," following a bequest of a pecuniary legacy to trustees, upon trust to invest the same and pay the dividends to the same person during her life, "for her own sole and separate use and benefit, free from the control of any husband whom she may marry, and so that her receipt alone may be a sufficient discharge":—

Held, that the circumstances of the testator having in contemplation the marriage of his niece, and having interposed trustees in the former gift to her separate use, distinguished the case from that of *Gilbert* v. *Lewis* (1 D. J. & S. 38); and that there was a good gift of the residue to the separate use of the wife.

The word "sole" is an operative word, and must be held to mean "separate," unless it appears from the will that the testator meant it to apply to

something other than the marital right of the husband. *In re Tarsey's Trust.* 561

2. On a gift by will to testator's daughters, "the share or shares of such daughters to be for their sole and separate use," followed by a contingent gift over to the survivors:—

Held, that the separate use attached to the accrued as well as to the original shares. *In re Jarman's Trusts.* 71

SEQUESTRATION.

An injunction was granted on the 6th of March restraining a local board of health from causing or permitting sewage, or water polluted therewith, to pass through drains or channels under their control into a river, to the injury of the Plaintiff, a miller, residing about three miles below the outfall of the works of the local board. Execution of the order was stayed till the 1st of July.

The company did not, subsequently to the 1st of July, stop the flow of sewage into the river, but alleged that they had not yet succeeded in discovering a mode of deodorizing the sewage—that compliance with the order was practically impossible, without stopping the drainage of the town, which would expose them to hostile proceedings at law and equity, and compel them to infringe an Act of Parliament; that there had been no wilful default, and that a sequestration would be ineffectual, as the property of the board was all public property—injurious to the public, as preventing the board from discharging their duties—and futile, as it would compel the members of the board to resign:—

Held, that there had been a gross and wilful contempt, and sequestration ordered to issue. *Spokes* v. *Banbury Board of Health.* 42

SERVANT OF COMPANY.

See WINDING-UP, 4.

SETTING ASIDE PURCHASE.

See FIDUCIARY RELATION.

SETTLED ACCOUNT.

See EXECUTOR DE SON TORT.

SETTLED ESTATE.

Testator devised his real estate, and bequeathed the residue of his personal estate to trustees, upon trust at their discretion, to sell the real estate and convert the personalty, and invest the proceeds, and to pay the income to his wife, during her life or widowhood, for the maintenance of his children during their minorities; and upon the death or marriage of his wife the fund and the income thereof were to be in trust for his children absolutely, in equal shares, as tenants in common:—

Held, that, as the period of sale was discretionary, and as the rents until sale must by implication go as the income of the proceeds of sale was directed to be applied, this was a settled estate within the meaning of the Settled Estates Acts. *In re Laing's Trusts.* 416

See BEST RENT.

SETTLED ESTATES ACT (19 & 20 VICT. c. 120.)

See SETTLED ESTATE.
BEST RENT.

SETTLED ESTATES AMENDMENT ACT (21 & 22 VICT. c. 77).

See SETTLED ESTATE.
BEST RENT.

SETTLEMENT.

A marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled. The corresponding operative part was a covenant by the husband

alone, without the usual words, "It is hereby agreed."

Held, that the covenant was not controlled by the recital, and was not binding on the wife. *Young* v. *Smith*. 180

See ACCRUER.
HUSBAND AND WIFE.
PORTIONS, DOUBLE.

SEWAGE.

See NUISANCE, 2.
SEQUESTRATION.

SHARE OF PARTNERSHIP, SALE OF.

See PARTNERSHIP, 1.

SHARE BY REPRESENTATION.

See DISTRIBUTION, PERIOD OF

SHARES, BEQUEST OF.

1. Bequest by will made in 1857, of "my shares in the *Great Western Railway*."

At the date of the will testatrix had no shares, strictly speaking, in the *Great Western*, or any other railway company; but she was possessed of *Wilts & Somerset* stock of the *Great Western Railway*, and also of preference and other stock, which was increased by further purchases of stock in the same company, between the date of the will and her death:—

Held, that all the *Great Western* and *Wilts & Somerset* stock in the possession of the testatrix at her death passed under the bequest. *Trinder* v. *Trinder*. 695

2. Bequest of thirty-three shares in the *E. Gas Company* amongst the testatrix's four children, followed by a bequest of "the remaining shares" to her godchild.

The number of shares held by the testatrix was 74, of which 37 were original paid-up shares of £25 each, and 37 new £25 shares, on which £15 was paid, and which had been allotted to the holders of original shares by way of bonus; a new share being issued for each original share.

Parol evidence for the purpose of showing that the testatrix was in the habit of treating, and intended to treat, the shares as double shares (so as to pass to her godchild, by the residuary gift, four double, and not forty-one single shares) held inadmissible.

The specific legatees allowed to take their bequests out of the original shares. *Millard* v. *Bailey*. 378

SHARES, FORFEITURE OF.

See CONTRIBUTORY, 1, 2.

SHIP, GENERAL.

See STOPPAGE IN TRANSITU.

SOLE USE.

See SEPARATE USE, 1.

SOLICITOR.

See TRUSTEE, LIABILITY OF.

SOLICITOR AND CLIENT.

See PRODUCTION, 3.
STATUTE OF LIMITATIONS, 1.

SOLICITOR FOR TWO PARTIES.

See COSTS, 3.

SPECIFIC LEGACY.

See REVOCATION BY CODICIL.

SPECIFIC PERFORMANCE.

See ENFRANCHISEMENT.
OPTION.
OUTGOINGS.
PARTNERSHIP, 1.
RESCIND, RIGHT TO.
VENDOR'S LIEN.
VENDOR AND PURCHASER, 1, 2.

STATUTES.

6 Anne, c. 18, s. 5.

See Holding over.

43 Eliz., c. 4.

See Charity.

9 Geo. 2, c. 36.

See Mortmain Act.

11 Geo. 2, c. 19, s. 15.

See Apportionment, 2.

3 & 4 Will. 4, c. 27, s. 3.

See Statute of Limitations.

1 Vict. c. 26 (Wills Act).

See Power, Testamentary.
Shares, Bequest of, 1.
Will Speaking from Death.

8 & 9 Vict. c. 16 (Companies Clauses Act).

See Promoters, Contract by.

8 & 9 Vict. c. 18 (Lands Clauses Act).

See Lands Clauses Act.
Costs, 1.

12 & 13 Vict. c. 106 (Bankrupt Law Consolidation Act, 1849).

See Bankruptcy.

15 & 16 Vict. c. 83 (Patent Law Amendment Act).

See Patent, 1, 2, 4.

16 & 17 Vict. c. 51 (Succession Duty Act), ss. 8, 51.

See Succession Duty Act

19 & 20 Vict. c. 47 (Joint Stock Companies Act, 1856).

See Companies Act, 1862..3.

19 & 20 Vict. c. 120 (Settled Estates Act).

See Settled Estate.
Best Rent.

20 & 21 Vict. c. 85 (Divorce Act), s. 25.

See Judicial Separation.

21 & 22 Vict. c. 27 (Cairns' Act).

See Damages, 1, 2, 3.
Damage, Measure of.
Stoppage in Transitu.

21 & 22 Vict. c. 77 (Settled Estates Amendment Act).

See Settled Estate.
Best Rent.

21 & 22 Vict. c. 108 (Divorce Amendment Act), s. 8.

See Judicial Separation.

23 & 24 Vict., c. 38 (Law of Property Amendment Act).

See Investment.

24 & 25 Vict. c. 134 (Bankruptcy Act, 1861).

See Composition.
Estate and Effects.

25 & 26 Vict. c. 42 (Rolt's Act), s. 1.

See Jurisdiction.

25 & 26 Vict. c. 89 (Companies Act, 1862).

See Companies Act, 1862.
Contributory.
Register, rectification of.
Winding-up, 1, 2, 3.

STATUTE OF LIMITATIONS.

Section 3.

1. A solicitor who pays off a mortgage debt due from his client, must be taken to act as the agent of the client, and not on his own behalf; and if he receives the rent of the mortgaged property, the possession is that of the client, and the solicitor cannot be charged with wilful default; nor will the statute run against the client. *Ward* v. *Carttar.* 29

Section 42.

2. The proceeds of sale of mortgaged premises, sold under the power of sale in a mortgage deed by the trustees of the mortgagee, were paid into Court in a suit for the administration of the mortgagee's estate; and there being nearly twenty years' arrears of interest due on the mortgage, exceeding in amount the fund in Court, the trustees petitioned for payment out of the fund to satisfy such arrears, and the assignee of the mortgagor was served with the Petition:—

Held, that the Petition was not a suit to recover arrears of interest within the 42nd section of the statute, 3 & 4 Will. 4, c. 27; and, therefore, that the mortgagee's trustees were entitled to more than six years' arrears of interest, and the fund was ordered to be paid over to them.

The decision in *Mason* v. *Broadbent* (33 Beav. 296) questioned. *Edmunds* v. *Waugh.* 418

STATUS.

See Legitimacy.

STAY OF EXECUTION.

Where a Plaintiff had obtained a decree, ordering him to be let into possession of real estate; on motion by the Defendant, who was about to appeal, the Plaintiff declining to give security to refund the rents in the event of the decree being reversed, execution of the decree was ordered to be stayed till further order; the Defendant giving security for what should be found due from him in respect of past rents: the future rents to be paid into Court, with liberty to the Plaintiff to apply in Chambers as to maintenance, and for costs of the appeal. *Barrs* v. *Fewkes.* 392

STOCK.

See Shares, Bequest of, 1.

STOCK, SALE OF.

See Apportionment, 1.

STOPPAGE IN TRANSITU.

Goods were shipped by the vendor on board of a general ship, belonging to a firm of which the purchaser was a member, and registered in the purchaser's name.

Three parts of the bill of lading (by which the goods were deliverable at *Goole* to the purchaser or assigns) were handed to the vendor, and the fourth part retained by the master:—

Held, that the delivery on board was not delivery to the purchaser, so as to preclude stoppage *in transitu* before the delivery of the goods at *Goole*.

The goods having been delivered into a warehouse to the purchaser's order, after the dishonour of a bill by the purchaser, and after notice to the master and the warehousemen of the stoppage *in transitu*, and some of the goods having since been parted with:—

Held, that damages were recoverable in respect thereof under Sir *H. Cairns's* Act. *Schotsmans* v. *Lancashire and Yorkshire Railway Company.* 349

SUBSTITUTED GIFT.

See Vesting, Time of.

SUBSTITUTED SERVICE.

Substituted service ordered on a solicitor who had acted for certain Defendants in transactions connected

with the subject-matter of the suit; the bill also to be served at the residence of the Defendants abroad, where personal service had been found impracticable. *Hope* v. *Carnegie.* 126

SUCCESSION DUTY ACT (16 & 17 Vict. c. 51, ss. 8, 51).

Where trustees for sale under a will, who have entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vest the estate in the person to whom (subject to the trust), the land is devised, whereby he becomes the proper party to convey, such legacy duty is properly paid, and no new contract is created whereby succession duty becomes payable.

A certificate from the *Inland Revenue Office*, that the duty is paid in respect of the land contracted to be sold, discharges a purchaser, and no particular form of certificate can be required by a purchaser under the *Succession Duty Act*, 1853, c. 51 s. 51. *Earl Howe* v. *Earl of Lichfield.* 641

SUCCESSION DUTY.

See Succession Duty Act.
Tenant for Life and Remainderman.

SUPPLEMENTAL ANSWER.

An application for leave to file a supplemental answer to correct a mistake in the original answer must be made by motion in Court, and not by summons in Chambers.

The Court will not grant leave to file a supplemental answer to correct a mistake in the original answer, without having materials before it to enable it to judge for itself as to there having been the alleged mistake. *Churton* v. *Frewen.* 238

SURETY.

See Composition.

SURRENDER.

See Attornment.
Best Rent.
Enfranchisement.

SURVIVOR.

See Gift to several or such as survive *A.*

SURVIVORS.

See Distribution, Period of.

SURVIVORSHIP.

See Accruer.
Next of Kin.
Vesting, Time of.

TENANT FOR LIFE AND REMAINDERMAN.

On a case submitted to the Court by trustees as to certain questions arising between the equitable tenant for life and the remainderman in the management of the estate:—

Held, that the produce of the sale of underwood and of timber cut periodically, in the regular course of thinning, was to be treated as income, and that of timber not cut in the regular course, but to improve the growth of the remaining trees, as capital:

Held, also, that the produce of the sale of gravel on the waste lands, and likewise the fines payable on grants of waste lands made by the trustees, and moneys payable in consideration of the waiver by the trustees of restrictive conditions in grants made by them (but not where the grants were made by the testator), and likewise preliminary fines paid to the trustees as lords of the manor on the enfranchisement of copyholds by persons admitted before the 1st of July, 1853, pursuant to the *Copyhold Act*, 1852, were respectively to be treated as income:

Held, also, that the expense of fencing waste lands granted to a trustee for the benefit of the estate must be paid out of capital; and that the costs of rendering accounts for the succession duty payable for the first

equitable tenant for life, must be paid out of income. *Earl Cowley* v. *Wellesley.* 656

See APPORTIONMENT, 1.
LANDS CLAUSES ACT, 1.

TENANT IN TAIL.

See PAYMENT OUT OF COURT.

TENANT PUR AUTRE VIE.

See APPORTIONMENT.

TESTAMENTARY POWER.

See POWER, TESTAMENTARY.

THINNINGS OF TIMBER.

See TENANT FOR LIFE AND REMAINDERMAN.

TIMBER.

See TENANT FOR LIFE AND REMAINDERMAN.

TIME FOR DEMURRING.

See PLEADING.

TITLE.

See ENFRANCHISEMENT.
TITLE, BAD.
TITLE DEEDS.
TITLE, STIPULATION AS TO.

TITLE, BAD.

See VENDOR AND PURCHASER, 1.
COSTS OF PURCHASER.

TITLE DEEDS.

Mortgagee taking conveyance of equity of redemption from trustee thereof, with notice of the trust, cannot withhold production of such conveyance in a suit by *cestui que trust* for redemption of the mortgage and reconveyance of the property, though one of the trusts was a trust for sale. *Smith* v. *Barnes.* 65

TITLE, STIPULATION AS TO.

See VENDOR AND PURCHASER, 2.

TRADE, COVENANT AGAINST.

See COVENANT AGAINST PARTICULAR TRADE.
WAIVER OF COVENANT.

TRADE MARK.

The Plaintiff being a thread manufacturer of repute, the Defendant bought in the market thread, wound on spools, not made by the Plaintiff, of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread who were known to be accustomed to purchase of the Plaintiff thread in the hank for the purpose of winding, and selling it when wound. Defendant sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of the Plaintiff's make, and invoiced them to the customer under the description of certain numbers, which the Plaintiff had adopted and exclusively used in order to designate his particular manufacture. The customer attached the Plaintiff's name and numbers to the spools of thread, and retailed it to the public as of the Plaintiff's make:—

Held, that there was not such a degree of wilful misrepresentation on the part of the Defendant as would justify the Court in granting an injunction, and bill dismissed, but without costs.

The name of a manufacturer, or a system of numbers adopted and used by him in order to designate goods of his make, may be the subject of the same protection in equity as an ordinary trade-mark. *Ainsworth* v. *Walmsley.* 518

See DAMAGE, MEASURE OF.

TRANSFER OF SHARES.

By the deed of settlement of a banking company it was declared that no person should be entitled to become a

transferee of a share unless he was approved by the Court of Directors:—

Held, that the Court must exercise its power reasonably, and would be controlled by a Court of Equity.

Whether it is a reasonable ground of objection that the proposed transferee is the nominee of a rival bank with which the shares have been deposited as security—*Quære*. *Robinson* v. *Chartered Bank*. 32

TRANSITU, STOPPAGE IN.

See STOPPAGE IN TRANSITU.

TRUSTEE.

See TITLE DEEDS.
TRUSTEE, LIABILITY OF.
TRUSTEES' COSTS.

TRUSTEE, LIABILITY OF.

A trustee is liable for the loss of a trust fund caused by the criminal fraudulent act of his solicitor, although in employing such solicitor he may have exercised ordinary care and discretion. *Bostock* v. *Floyer*. 26

TRUSTEES.

See POWER OF SALE.

TRUSTEE'S COSTS.

A debtor made a conveyance of all his property in trust for his creditors, by a deed in the form in schedule D to the *Bankruptcy Act*, 1861. The deed was executed by the debtor and the trustees and duly registered, but was not assented to by the proportion of creditors required by section 192. The trustees got in and converted the estate, and deposited the proceeds in their joint names in a bank. Four months after the date of the deed the debtor was adjudicated bankrupt on a judgment-debtor summons for non-payment of a judgment debt due before the date of the deed:—

Held, upon a bill filed by the assignee in bankruptcy, and one of the trustees of the composition deed, against the other trustee, to compel payment to the assignee of the proceeds of the bankrupt's estate, that as the trusts of the deed were invalid, the trustee was not entitled to retain the costs and expenses incurred by him in the execution thereof. *Smith* v. *Dresser*. 651

TRUSTEES OF MORTGAGEE.

See STATUTE OF LIMITATIONS, 2.

TRUST FOR SALE.

See SUCCESSION DUTY ACT.

ULTRA VIRES.

A company was incorporated in the first place for "the working, preparation, and sale of porcelain clay," with power, if it should be deemed expedient, after the original business had become developed, to combine "mining operations" with the original business.

By the company's deed it was provided that it should be competent for any extraordinary general meeting, by a majority of two-thirds in number of the shareholders, to empower and require the directors to bind the company and every shareholder thereof, to any act, deed, matter, or thing whatsoever, which the company, by virtue of its corporate capacity, or otherwise, or all the shareholders together, would be enabled to make, do, or execute, if the consent of every shareholder were given thereto. Also, that the directors should have power to make contracts, and in case it should be doubtful whether it was in the competence of the directors to conclude any contract, the same might be submitted to an extraordinary general meeting, and if sanctioned, should be binding upon every shareholder, whether under incapacity or not, in like manner as if every shareholder were *sui juris* and had consented.

The company obtained leases of land for ninety-nine years, commenced business in 1852, and paid one dividend, and no other, the undertaking not turning out successful:—

Held, that, after a period of nine

years of unsucessful working, a majority of two-thirds of the shareholders in general meeting were empowered, under the above clauses, to authorize the directors to make a valid mining lease for twenty-one years of the whole of the works and buildings of the company.

Semble, the clauses would not authorize the like majority to engage the company in an undertaking wholly unconnected with their original purpose. *Featherstonhaugh* v. *Lee Moor Porcelain Clay Company.* 318

See CONTRIBUTORY, 3.
PROMOTERS, CONTRACT BY.

UNDERLEASE.

See ATTORNMENT.

UNDERLESSEE.

See COVENANT AGAINST PARTICULAR TRADE.

UNDERVALUE.

See FIDUCIARY RELATION.

UNMARRIED.

See GIFT TO SEVERAL, OR SUCH AS SURVIVE *A.*

USUAL COVENANT.

Under a stipulation that the lease should contain all usual covenants to protect the interest of the lessor:—

Held, that a covenant against alienation was not a usual covenant. *Buckland* v. *Papillon.* 477

VAULT IN CHURCHYARD.

See CHARITY.

VENDOR'S LIEN.

Where a decree had been obtained by a vendor against a railway company for specific performance of a contract for sale, in which inquiries were directed to ascertain the amount due for damages and costs, and the amount, when found due, together with the purchase-money, was ordered to be paid, but was not declared to be a a charge on the land:—

Held, that the vendor was not entitled, under the liberty to apply, to enforce by petition a lien on the land for the sums due, especially as there were incumbrancers not parties to the suit, whose rights would be affected by such lien. *Attorney-General* v. *Sittingbourne and Sheerness Railway Company.* 636

See MARSHALLING.
SALE OF RAILWAY.

VENDOR AND PURCHASER.

1. Defendant purchaser in possession, who, by decree directing an inquiry as to title, was ordered to pay into Court the interest on his purchase-money; the decree also declaring the purchase-money a lien on the estate:—

Held, not entitled to dismiss the bill for specific performance, although the certificate was that the Plaintiff could not shew a good title, it appearing on the evidence that the Defendant had since the purchase, by his own act, acquired the means of curing the defect in the title. Leave was given to amend or file a supplemental bill. *Hume* v. *Pocock.* 662

2. On a bill for specific performance of an agreement to purchase certain lands "the Plaintiff only to produce a title from his vendor;" it appearing that Plaintiff at the instance of the Defendant had purchased all the estate, right, title, and interest in the said lands from one of four reputed owners, the Court held that Defendant was not at liberty to show *aliunde* that Plaintiff's vendor had no title, and decreed specific performance of the agreement. *Hume* v. *Pocock.* 423

See CONDITIONS OF SALE.
FIDUCIARY RELATION.
SUCCESSION DUTY ACT.

VESTING.

See ACCRUER.
DISTRIBUTION, PERIOD OF.
GIFT TO SEVERAL OR SUCH AS SURVIVE *A.*

VESTING, TIME OF.

Where there is a gift by will, "upon the death of *A.*, to *B.*, *and* if *B.* shall be then dead, to *B.'s* children;" if *B.* dies before *A.*, it is not necessary that *B's* children should survive *A.*, in order to entitle them to vested interests, following *Lanphier* v. *Buck* (34 L. J. (Ch.) 650); and there is no difference in the result, if the gift be, "upon the death of *A.*, to *B.*, *or* if *B.* shall be then dead, to *B.'s* children;" overruling the doubt intimated in *Crause* v. *Cooper* (1 J. & H. 207, 213).

But there is a difference in the result of the two forms of limitation, as regards those children of *B.* who may have died in the lifetime of their parent; if the gift be preceded by the word "and," it is an original gift, and all the children of *B.* will take; if it be preceded by "or," it is substitutionary, and those children only will take who survive their parent.

Therefore, where a fund was bequeathed to four persons, *R.*, *E.*, *S.*, and *H.* by name, "who should be then living, or to the children of such of them as should be then dead," the event indicated by "then" being one which might fall beyond the limit fixed by the rule against perpetuities—and *S.* died before the event:—

Held, that the gift to the children of *S.* was not void for remoteness, and that all the children of *S.* who survived her participated in the gift, whether living or not at the period of distribution; but that none of the children of *S.* who died in her lifetime participated in the gift. *In re Merricks' Trusts.* 551

VESTRY.

See WAY, DEDICATION OF.

VETO.

See TRANSFER OF SHARES,

VOIDABLE DEED, RIGHT OF VOLUNTEER TO SET ASIDE.

See CHAMPERTY.

VOLUNTARY AGREEMENT.

See PURCHASER FOR VALUE.

VOLUNTARY CONVEYANCE.

See CHAMPERTY.

VOLUNTARY DECLARATION.

See RELEASE.

VOLUNTARY WINDING-UP.

See COMPANIES ACT, 1862..1.

WAIVER.

See OPTION.

WAIVER OF ARBITRATION.

See ARBITRATION.

WAIVER OF COVENANT.

Defendant *A.* was the purchaser in fee of a house and premises, part of an estate formerly the property of the Plaintiffs, of which all the purchasers of such parts as were sold (including *A.*) were under a covenant not to use the house and premises so purchased, or any part thereof, as a public-house or beer-shop. *A.* built a shop at the back of his premises, and on the 11th of February, without consent, but without interference on the part of the Plaintiffs, opened it as a beer-shop. In June he leased the beer-shop to the co-Defendant *B.*, who carried on the same business with the consent of *A.*,

but equally without consent of the Plaintiffs, who, on the 8th of July, served *B.* with notice to desist. It further appeared that a purchaser of another house on the same estate had also, without consent, but without interference on the part of the Plaintiffs, opened a beer-shop at the back of his premises.

The bill for an injunction was filed on the 1st of August:—

Held, that the conduct of the Plaintiffs did not amount to such a degree of acquiescence and waiver as to preclude them from the right of enforcing the covenant. *Mitchell* v. *Steward*. 541

WAIVER OF REQUISITION.

See RESCIND, RIGHT TO.

WAY, DEDICATION OF.

The dedication by the owner of the soil of a right of way from continuous user can only be presumed in favour of the public, not of the inhabitants of a particular parish.

The Vestry of a parish, cannot sustain a suit to restrain the infringement of a public right of way, except as relators, on an information by the Attorney-General, even though they are expressly authorized by Act of Parliament to indict any person stopping a right of way within the parish, "and to take such other proceedings for the opening thereof as to them should seem expedient."

The Vestry of a parish, so authorized by a local Act, filed a bill to remove an arch built over a way in the parish, which they alleged had been used by and dedicated to the public for forty years. It appeared that for the first twenty years of that period there had been a lease from the owner of the soil with a right to build over the way; that then the lease became merged in the inheritance, and that, since, the Vestry had claimed the way as belonging to them for the exclusive use of the inhabitants of the parish:—

Held, that the suit could not be sustained on its merits and was not properly framed. *Vestry of Bermondsey* v. *Brown*. 204

WIFE'S LEGACY.

See HUSBAND AND WIFE.

WIFE'S REVERSIONARY INTEREST.

See JUDICIAL SEPARATION.

WILFUL DEFAULT.

See STATUTE OF LIMITATIONS, 1.

WILL.

See CONVERSION.
COVENANT TO SETTLE FUTURE PROPERTY.
DISTRIBUTION, PERIOD OF.
GIFT TO SEVERAL OR SUCH AS SURVIVE *A.*
IMPLICATION, ESTATE BY.
IMPLICATION, GIFT BY
LEGITIMACY.
PORTIONS, DOUBLE.
POWER, REFERENCE TO.
POWER, TESTAMENTARY.
REVOCATION BY CODICIL.
SEPARATE USE, 1, 2.
SHARES, BEQUEST OF, 1, 2.
VESTING, TIME OF.
WILL SPEAKING FROM DEATH.

WILL SPEAKING FROM DEATH.

Devise by will made since the *Wills Act* by the description of "my messuage, partly freehold, and partly leasehold, No. 3, *C. Street*," to specific devisees, with a declaration of testator's wish that the same should not be sold, and devise of residuary estate upon trust for sale. Testator subsequently purchased the reversion of the leasehold part of the messuage:—

Held, that the whole of the messuage passed by the specific devise. *Miles* v. *Miles*. 462

See SHARES, BEQUEST OF, 1.

WINDING-UP.

1. The lessor of a quarry who has granted a lease to a company, incorporated by charter, with the usual covenant for payment of rent:—

Held, not entitled, on the winding-up of the company, to have any claim entered under section 158 of the *Companies Act*, 1862, in respect of future rent, when the lease had been assigned to a purchaser. *In re Haytor Granite Company.* 11

2. After a Petition has been presented for the winding-up of a company, the Court has jurisdisdiction under the 85th section of the *Companies Act*, 1862, to restrain the sale by the sheriff of property of the company, seized under a writ of *fi. fa.* before the presentation of the Petition. *In re Hill Pottery Company.* 649

3. The advertisement of a winding-up Petition, under the Orders of 1862, is of itself sufficient notice of such Petition to justify the company and shareholders who are interested in such company in appearing on the Petition, and if they are successful in opposing it, they are entitled to their costs, although they may not have been served with the Petition.

And in a case where a company and shareholders, though not served, appeared on a Petition, after notice that it was intended to be withdrawn, they were held entitled to costs incurred by them before they had notice of such intended withdrawal. *In re Marlborough Club Company.* 216

4. An order for the winding-up of a company is notice of discharge to the servants of the company.

Servants of a company ordered to be wound-up are not entitled to payment in full, in priority to other creditors, of any part of the wages or salary due to them at the date of the winding-up. *In re General Rolling Stock Company.* 346

See COMPANIES ACT, 1862. CONTRIBUTORY.

WINDING-UP UNDER SUPERVISION.

See COMPANIES ACT, 1862 .. 1.

WINDOW IN CHURCH.

See CHARITY.

WORDS "OR" AND "AND."

See VESTING, TIME OF.

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